

NORTH CAROLINA COURT OF APPEALS REPORTS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

EDWARD L. WOODS AND WIFE, BETTY R. WOODS, PLAINTIFFS v. ODELL McFADDEN MANGUM, EXECUTRIX OF THE ESTATE OF JOHN ED MANGUM, DEFENDANTS
v. GEORGE W. MILLER, JR., PUBLIC ADMINISTRATOR OF THE ESTATE OF JOHN ED MANGUM, INTERVENOR DEFENDANT

No. COA08-1134

(Filed 15 September 2009)

1. Appeal and Error— preservation of issues—failure to object—dead man statute

The trial court did not err in an action to clear title to property by granting summary judgment in favor of plaintiffs. Even if the Estate had preserved the issue of whether an oral communication between Dr. Woods and Vann, now deceased, was incompetent evidence under N.C.G.S. § 8C-1, Rule 601(c), it waived the protection of the dead man's statute by eliciting this testimony through interrogatories.

2. Evidence— affidavit—credibility

The trial court did not err in an action to clear title to property by granting summary judgment in favor of plaintiffs even though the Estate contends Dr. Woods' affidavit lacked credibility because: (1) there was no evidence of untruthfulness or a personal history of misconduct; (2) the affidavits did not seem inherently incredible, the circumstances themselves are not suspect, and the Estate did not show any need for cross-examination; and (3) any credibility concerning Dr. Woods' affidavit was latent in nature, which was insufficient in itself to deny summary judgment.

WOODS v. MANGUM

[200 N.C. App. 1 (2009)]

3. Appeal and Error—preservation of issues—summary judgment properly denied on other issues

There was no need to address plaintiffs' remaining cross-assignments of error denying plaintiffs' motion for summary judgment on the alternative theories of estoppel and lack of standing because the trial court did not err by denying summary judgment to the Estate.

Judge HUNTER, ROBERT C. dissenting.

Appeal by intervenor defendant and cross-appeal by plaintiffs from judgment entered 10 June 2008 by Judge Howard E. Manning, Jr. in Durham County Superior Court. Heard in the Court of Appeals 11 March 2009.

Glenn, Mills, Fisher & Mahoney, P.A., by Carlos E. Mahoney, and Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr., for plaintiffs-appellees.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for intervenor defendant-appellant.

CALABRIA, Judge.

George W. Miller, Jr. ("defendant"), as Public Administrator of the Estate ("the Estate") of John Ed Mangum ("Mr. Mangum"), appeals a judgment granting Edward L. Woods ("Dr. Woods") and Betty R. Woods' (collectively "plaintiffs") Motion for Summary Judgment and denying defendant's Motion for Summary Judgment. We affirm.

I. Facts

On 4 August 1987, plaintiffs purchased two tracts of land in Bahama, North Carolina, from John Ed Mangum and his wife Mary Elizabeth Mangum (collectively "the Mangums"). The Mangums financed the purchase of the land, approximately 23 acres adjoining their tobacco farm, by executing a promissory note secured by a purchase money deed of trust in favor of the Mangums in the amount of \$66,634. The note was payable with an initial payment of \$5,000 on 31 September (sic) 1987 and annual payments of principal and interest in the amount of \$10,000, beginning 1 June 1988 and continuing on the first day of June each year until paid.

Between 4 August 1987 and 11 August 1993, plaintiffs made periodic payments. On 11 August 1993, plaintiffs executed a promissory

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[200 N.C. App. 1 (2009)]

note in the amount of \$44,000 secured by a deed of trust in favor of North Central Farm Credit, ACA (“NCFC loan”). At the NCFC loan closing, plaintiffs paid Mr. Mangum \$16,976.44. At that time, Mr. Mangum believed the balance due on the original note was \$11,205.48. Plaintiffs dispute that there was a balance due at that time and contend that the original note was paid in full. After the NCFC loan closing, the record contains no evidence that the original deed of trust was subordinated or marked paid and cancelled in the Durham County Registry.

According to the terms of the promissory note to the Mangums, the payment that was due after 11 August 1993 became due on 1 June 1994. About this time, a dispute between the parties arose over whether payments that the Mangums were receiving on their tobacco farm from crop insurance and tobacco allotments should have been paid to plaintiffs. Plaintiffs contend that after the sale of the 23 acres, the Mangums never notified the proper authorities that their farm acreage had been reduced and that, as a result, they estimated approximately \$28,663.20 in crop insurance and tobacco allotments that should have been paid to plaintiffs between 1987 and 1993 was paid to the Mangums. Plaintiffs further contend that this amount should have been credited to the balance due on their promissory note to the Mangums and that they were entitled to an offset on any balance that was due. The Mangums denied any offset was due.¹

Between 30 June 1994 and 30 November 1995, the parties, through their respective counsel, negotiated terms of a potential settlement agreement. On 22 August 1995, Mr. Floyd B. McKissick, Jr. (“McKissick”), at that time counsel for plaintiffs, wrote to Arthur Vann (“Vann”), at that time counsel for the Mangums, offering to settle the matter in exchange for a clear title for the land and a payment by the Mangums of \$16,213.42. Vann countered by a letter dated 30 August 1995 to McKissick stating that the Mangums were “willing to forget the remainder of the payment [note] and give [plaintiffs] a clear title.” McKissick replied to the counteroffer on 26 October 1995 by offering to settle for cancelling the promissory note indebtedness and a payment from the Mangums of \$8,100. Vann, on 3 November 1995, repeated his earlier offer. This counteroffer was forwarded to plaintiffs by their counsel. Sometime between 30 November 1995 and 17 January 1996, a conversation occurred between plaintiffs and Vann in which plaintiffs affirmed that they accepted the offer contained in Vann’s letters to McKissick of 30 August and 26 October 1995. On 17

1. The amount of the balance due, if any, remains unliquidated.

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January 1996, McKissick sent plaintiffs a letter indicating that he was attempting to “undo the damages” caused by plaintiffs’ acceptance of the settlement agreement. McKissick stopped representing plaintiffs shortly thereafter.

Plaintiffs did not pursue legal action against the Mangums regarding the tobacco allotment or crop insurance claim nor did they make any further payments on the promissory note to the Mangums. The Mangums, however, failed to cancel the promissory note and deed of trust. On 10 June 1998, an attorney representing the Mangums sent plaintiffs a letter demanding \$17,235.15 under the promissory note. A second letter was sent to plaintiffs on 11 August 1998, threatening foreclosure of their property. In response to this letter, Dr. Woods sent a letter to the Mangums’ attorney stating, in part: “At this time, I cannot settle this matter as Mr. Mangum, his lawyer, and I had previously agreed.” The Mangums took no further action to collect on the promissory note or foreclose on the property.

Mr. Mangum died on 26 June 1999. His wife at that time, Odell McFadden Mangum (“the Executrix”),² qualified as Executrix of Mr. Mangum’s Estate and listed the promissory note as an asset of the Estate in her inventory. Plaintiffs filed a claim for the tobacco allotments and crop insurance claims from the Estate. Plaintiffs also filed for federal bankruptcy protection on 29 August 2002 and were released from bankruptcy on 3 May 2007. The Mangums’ claim was not discharged as a result of plaintiffs’ bankruptcy. The Executrix, who had failed to take any legal action to collect on the promissory note, was removed from her position by the Clerk of Superior Court of Durham County on 7 June 2007, and defendant was appointed Public Administrator.

Plaintiffs filed the present action against the Executrix on 20 June 2007 to obtain clear title to their property. Although the Executrix never answered the complaint, a default judgment was not entered against her. On 8 October 2007, a consent order was entered allowing defendant to intervene as an interested party in this action.

The pleadings, as they stood at the time of the Motions for Summary Judgment, included: (1) a claim by plaintiffs seeking to have the purchase money deed of trust cancelled of record, based upon a settlement between plaintiffs and the Estate’s decedent; (2) a counterclaim by the Estate for payment of the balance of the note

2. Odell McFadden Mangum, Executrix of the Estate of John Ed Mangum, is not a party to this appeal.

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plus attorney fees; and (3) a reply alleging the affirmative defenses of waiver, estoppel, accord and satisfaction, payment, statute of limitations, and lack of standing. Both parties filed a series of letters between counsel, and plaintiffs submitted an extensive affidavit from Dr. Woods. No objections appear on the record as to the admission of this documentary evidence.

On 10 June 2008, the trial court granted plaintiffs' Motion for Summary Judgment and held that the matter was settled in 1995. The trial court ordered the note and deed of trust marked cancelled in the Durham County Registry, enjoined plaintiffs from pursuing their tobacco allotment and crop insurance claims, and dismissed the pending foreclosure action. The Estate appeals the summary judgment decision on the basis that a genuine issue of material fact exists as to whether a settlement was reached and that the trial court erred in not granting summary judgment to the Estate on the promissory note. Plaintiffs cross-appeal the trial court's denial of their Motion for Summary Judgment on the issues of estoppel and defendant's lack of standing to enforce the note.

II. Standard of Review

The standard of review on appeal for a summary judgment is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. The question is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is a genuine issue as to any material fact.

Sellers v. Morton, 191 N.C. App. 75, 81, 661 S.E.2d 915, 920-21 (2008) (internal citations and quotations omitted). "The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *McGuire v. Draughon*, 170 N.C. App. 422, 424, 612 S.E.2d 428, 430 (2005) (citation omitted). Once the moving party has met its burden, "the opposing party must forecast evidence indicating the existence of a triable issue of material fact." *Sellers*, 191 N.C. App. at 81, 661 S.E.2d at 921 (2008) (citation omitted). "All facts asserted by the [nonmoving] party are taken as true and their inferences must be viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted). On appeal, this Court reviews an order granting summary judgment *de novo*. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006)(citation omitted).

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III. Analysis

The record reveals that in 1995, the parties were aware that their respective attorneys, McKissick and Vann, were conducting settlement negotiations. Both parties submitted to the trial court detailed correspondence between counsel outlining the negotiations. In addition, plaintiffs have submitted correspondence from their counsel at the time evidencing oral conversations between plaintiffs and Vann.

[1] The Estate makes no claim that the exchange of correspondence or plaintiffs' affidavit is inaccurate or fails to accurately represent the negotiating positions of the parties at that time and do not deny the communications between counsel or between Dr. Woods and Vann. Instead, the Estate's initial argument is that summary judgment should not have been granted because plaintiffs' evidence of the settlement is dependent upon an oral communication between Dr. Woods and Vann, now deceased, and that the communication is incompetent under N.C. Gen. Stat. § 8C-1, Rule 601(c) (2007) ("the dead man's statute").

The record, however, fails to reveal that the Estate raised this issue before the trial court, and hence we cannot consider this contention because it has not been properly preserved.³ Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure specifies that "to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1) (2008).

The Estate argues "the court took judicial notice of [Vann's] death." We assume this statement is factually correct; however, counsel does not argue, nor does it logically follow from the fact that the trial court took judicial notice of Vann's death, that an objection to Dr. Woods' affidavit on grounds that it violated the dead man's statute was properly lodged. Without a timely request, objection, or motion, we are unable to consider this assignment of error.

Even if the Estate had preserved this objection and properly assigned it as error, it waived the protection of the dead man's statute by eliciting this testimony through interrogatories. *See Breedlove*

3. Counsel attaches to his brief as Exhibit A, a letter dated 8 October 2008 from the State Bar documenting the death of Vann. The summary judgment order was signed 10 June 2008.

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v. Aerotrim, U.S.A., Inc., 142 N.C. App. 447, 452, 543 S.E.2d 213, 216 (2001).

In the instant case, plaintiffs met their burden of showing that no genuine issue of fact exists that the parties reached a settlement agreement. As plaintiffs correctly point out, a compromise and settlement is legally distinct from an accord and satisfaction. *Bizzell v. Bizzell*, 247 N.C. 590, 601, 101 S.E.2d 668, 676 (1958). Because mutual unliquidated indebtedness is the issue in these claims, compromise and settlement is the appropriate legal standard by which to judge the agreement. *Id.* The other distinction between accord and satisfaction and compromise and settlement is that no action on the part of either party is required for a compromise and settlement, while some action is required for an accord and satisfaction. *Id.*

Documentary evidence in the exchange of correspondence between the parties' respective counsel and between the Mangums' counsel and plaintiffs supports the finding of a settlement agreement. The Estate, in its brief, does not argue that the terms of the agreement are indefinite. North Carolina presumes an attorney has the authority to act for a client he professes to represent. *Gillikin v. Pierce*, 98 N.C. App. 484, 488, 391 S.E.2d 198, 200 (1990). The Estate does not claim nor does it offer any evidence that Vann's offers were unauthorized by the Mangums. Since no further action was needed to effectuate the settlement, uncontested evidence suggests that the parties had a meeting of the minds.

Furthermore, plaintiffs' forbearance in pursuing their claims for crop insurance or tobacco allotment funds, which may have been due, provides sufficient consideration for the agreement. *See Stokes v. Edwards*, 230 N.C. 306, 310, 52 S.E.2d 797, 801 (1949). While forbearance is not an act of payment, it does represent a modification of plaintiffs' legal status in reliance upon the Mangums' promise to provide "a clear title," and provides some evidence of acceptance of the settlement. Based upon the record, we also conclude that plaintiffs met their burden of showing that no genuine issue of fact exists that the parties had reached a settlement of their mutual claims between November 1995 and January 1996.

[2] Secondly, the Estate argues that *even if* a settlement had been reached, Dr. Woods' affidavit lacks credibility to the extent that it was error for the court to grant summary judgment. The Estate contends that following the agreement, the parties' conduct in continuing to pursue these same claims subsequent to the settlement casts doubt

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on the credibility of Dr. Woods' affidavit that an agreement was reached. In other words, the Estate contends the parties' acts following the agreement are sufficient to supply evidence that Dr. Woods is unbelievable in his statements that he accepted the Mangums' offer.

In support of its argument, the Estate cites *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976) as authority for the proposition that the credibility of the affiant can create a genuine issue of fact. *Kidd* holds:

. . . summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate. This is not a holding that the trial court is required to assign credibility to a party's affidavits merely because they are uncontradicted. To be entitled to summary judgment the movant must still succeed on the basis of his own materials. He must show that there are no genuine issues of fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury. Further, if the affidavits seem inherently incredible; if the circumstances themselves are suspect; or if the need for cross-examination appears, the court is free to deny the summary judgment motion. Needless to say, the party with the burden of proof, who moves for summary judgment supported only by his own affidavits, will ordinarily not be able to meet these requirements and thus will not be entitled to summary judgment.

289 N.C. 343, 370-71, 222 S.E.2d 392, 410 (1976).

Our review of the evidence submitted by the parties in the record shows that plaintiffs met the standards of *Kidd*, and the trial court was within its discretionary authority to grant summary judgment, or not, based upon its own independent determination of the credibility of the affidavits. As previously discussed, clear, uncontradicted documentary evidence illustrates the negotiations and ultimate agreement by the parties. The law looks favorably on the settlement of disputes. *Burris v. Starr*, 165 N.C. 657, 663, 81 S.E. 929, 931 (1914). There is no evidence of untruthfulness or a personal history of misconduct. Finally, the acceptance of the offer was not to plain-

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tiffs' financial benefit, if their claims against the Estate had merit. These facts satisfy the requirements of *Kidd*, which plaintiffs are required to prove for a summary judgment to be granted. The affidavits do not seem inherently incredible; the circumstances themselves are not suspect; and the Estate has not shown any need for cross-examination.

The Estate did not forecast evidence sufficient to raise a genuine issue of fact, other than the possibility of the impeachment of Dr. Woods based upon his subsequent conduct. These second thoughts can be understood as a layman misunderstanding the legal significance of a settlement agreement. Dr. Woods' ambiguous subsequent conduct can also be understood as reacting to the continued refusal of the Mangums to provide plaintiffs a clear title. Based upon the record evidence produced, plaintiffs do not lack credibility. Rather, it is the Estate whose credibility is lacking. Specifically, the Estate attempted to circumvent its duty to comply with the agreement the Mangums' attorney had negotiated in good faith with plaintiffs. Any credibility concerning Dr. Woods' affidavit is clearly latent in nature, which under *Kidd* is insufficient, in itself, for the trial court to deny summary judgment.

The forecast of the Estate's case solely based on the alleged lack of credibility of Dr. Woods did not compel the trial court to deny summary judgment. The only evidence that plaintiffs needed to produce was acceptance to written terms produced by the Mangums' attorney, which they did. The Estate has not made its case that the trial court erred in denying summary judgment.

IV. Conclusion

[3] Because we affirm the decision of the trial court on the issue of summary judgment in favor of the plaintiffs, we necessarily conclude that the trial court did not err in denying summary judgment to the Estate, and there is no need to address plaintiffs' other cross-assignments of error denying plaintiffs' Motion for Summary Judgment on the alternative theories of estoppel and lack of standing.

Affirmed.

Judge HUNTER, Jr., Robert N., concurs.

Judge HUNTER, Robert C., dissents in a separate opinion.

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HUNTER, ROBERT C., Judge, dissenting.

I disagree with the majority's conclusion that where parties to a lawsuit file cross-motions for summary judgment, the party against whom judgment was entered is precluded from arguing on appeal that material issues of fact exist, making summary judgment improper. Because I further conclude that a triable issue of fact exists as to whether the parties had previously settled their claim, I would reverse the trial court's judgment and remand for trial. Thus, I respectfully dissent.

It is well-established that "[o]ur standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

The majority holds that because the Estate's motion for summary judgment asserts that their forecast of evidence establishes that "there is no genuine issue as to any material fact on the claims of the Plaintiffs," the Estate is now precluded on appeal from arguing that there is a triable issue of fact with respect to its claim that the parties never entered into an agreement to settle their dispute. I disagree.

Our Supreme Court, in *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987), discussed the nature of summary judgment and appellate courts' role in reviewing grants of summary judgment:

[S]ummary judgment, by definition, is always based on two underlying questions of law: (1) whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment. On appeal, review of summary judgment is necessarily limited to whether the trial court's conclusions as to these questions of law were correct ones.

Id. at 415, 355 S.E.2d at 481 (internal citations omitted). *Accord Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs.*, 362 N.C. 269, 277, 658 S.E.2d 918, 923-24 (2008) ("[O]n appeal [from grant of summary judgment], review is necessarily limited to whether the trial court's conclusions as to whether there is a genuine issue of material fact and whether the moving party is entitled to judgment, both questions of law, were correct."); *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 353, 595 S.E.2d 778, 782 (2004) ("An

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appeal from an order granting summary judgment raises only the issues of whether, *on the face of the record*, there is any genuine issue of material fact, and whether the prevailing party is entitled to a judgment as a matter of law.” (Emphasis added.)).

As the applicable standard of review is *de novo*, an “appellate court must carefully examine the *entire record* in reviewing a grant of summary judgment,” *Ellis*, 319 N.C. at 415, 355 S.E.2d at 481, in order to assess the correctness of the trial court’s determination of the “two questions of law *automatically* raised by summary judgment[,]” *id.* at 416, 355 S.E.2d at 481 (emphasis added). Thus, standing alone, the statement in a motion for summary judgment that the undisputed facts entitle a party to judgment as to *their claim* does not foreclose that party from subsequently arguing on appeal that the trial court erroneously entered judgment for the prevailing party due to triable issues of fact regarding the prevailing parties’ claim. It is a practical reality that parties file cross-motions for summary judgment all the time. The majority’s holding would effectively preclude any party that moved for summary judgment, and did not prevail, from being able to challenge the underlying facts of the case.

The attorneys in this case, in drafting their respective motions, could have used more precise language. The gist of each motion was that, from the respective perspectives of each party, they believed that the application of the law to the undisputed facts relating to their argument entitled them to judgment as a matter of law. I do not believe that either side was conceding that the facts supportive of the other party’s argument were undisputed, and that if they failed to prevail on summary judgment, they could not contest the facts on appeal. I would, therefore, address the merits of this appeal.

Turning to the merits, I believe that there is a genuine issue of material fact precluding summary judgment in this case. Simply put, in support of their motion, plaintiffs submitted affidavits and communications tending to show that the parties had reached a settlement agreement in November 1995; the Estate forecasted evidence suggesting just the opposite. In his affidavit, Dr. Woods states that Mr. Vann—Mr. Mangum’s attorney—offered to settle the dispute by having the Mangums cancel the promissory note and deed of trust in exchange for plaintiffs agreement to not seek to recover the tobacco allotments. Dr. Woods explains that when he found out about the settlement offer, he contacted Mr. Vann directly and accepted the offer. Dr. Woods unequivocally states that he and his wife “believe that a settlement was reached between us and Mr. Mangum.” The record

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also includes a copy of plaintiffs' 30 November 2005 letter to Mr. Vann memorializing their "accept[ance]" of the Mangum's offer.

The Estate, in contrast, points to evidence of the parties' conduct after the purported settlement date indicating that they had not reached an agreement. Specifically, the Estate identifies Mr. McKissick's 17 January 1996 letter to plaintiffs in which Mr. McKissick states that he is "continuing to negotiate with Art Vann[,] the attorney for the Mangum's [sic], in connection with your case." The record also contains Mr. McKissick's 29 January 2006 termination letter to plaintiffs, stating that he would no longer be representing them in their "dispute with the Mangums relating to the transfer of tobacco allotments to you."

Plaintiffs argue that the consideration for the compromise of receiving a clear title from the Mangums was plaintiffs' agreement to not pursue their claim to recover the tobacco allotments. Plaintiffs, however, sent a demand letter to the Estate on 8 October 1999, claiming \$35,032.80 for the tobacco allotments—a letter sent prior to the Estate's demand on the note. This evidence, when considered in the light most favorable to the Estate, as is required on review of summary judgment, tends to show that the parties had not entered into a settlement agreement in November 1995.

It is not possible to determine whether the parties reached a settlement without first assigning greater weight or credibility to one party's evidence or the other's. However, "[i]f there is any question as to the weight of evidence, summary judgment should be denied." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999). Cases, such as this one, where there is conflicting evidence as to whether a settlement agreement has been reached are precisely the type of cases in which summary judgment is inappropriate.⁴ See *Credit Union v. Smith*, 45 N.C. App. 432, 437, 263 S.E.2d 319, 322 (1980) (concluding summary judgment should be denied "[i]f different material conclusions can be drawn from the evidence"); see also *Sanyo Electric, Inc. v. Albright Distributing Co.*, 76 N.C. App. 115, 118, 331 S.E.2d 738, 740 (stating summary judgment should be denied unless "the *only* reasonable

4. Here, if the trial court had not entered summary judgment, it would have heard the case in a bench trial since neither party requested a jury trial. In that scenario, the parties could have stipulated to the evidence to be presented in order to avoid oral testimony, and requested the trial court to make findings of fact and conclusions of law under Rule 52(a) of the North Carolina Rules of Civil Procedure. The parties could then challenge the trial court's stated findings and conclusions on appeal.

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inference” from materials is that settlement agreement was reached (emphasis added)), *disc. review denied*, 314 N.C. 668, 335 S.E.2d 496 (1985). Here, the evidence was in dispute as to compromise and settlement. For the foregoing reasons, I respectfully dissent.

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KELLE RENZULLI TALLMAN, PLAINTIFF v. THE CITY OF GASTONIA, N.C., DEFENDANT

No. COA08-1021

(Filed 15 September 2009)

**Statutes of Limitation and Repose— wrongful death—qualifi-
cation of administratrix of estate—ratification and rela-
tion back**

The dismissal of a wrongful death action as barred by the statute of limitations was reversed where plaintiff was not appointed as administratrix of the estate until after the statute of limitations had run. Ms. Tallman’s participation in the lawsuit once she had become administratrix was sufficient to ratify the filing of the summons and application for extension of time.

Appeal by plaintiff from order entered 29 May 2008 by Judge Richard D. Boner in Gaston County Superior Court. Heard in the Court of Appeals 12 February 2009.

Don H. Bumgardner, Attorney at Law, by Thomas D. Bumgardner, for plaintiff-appellant.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson and Aaron C. Low, for defendant-appellee.

GEER, Judge.

Plaintiff Kelle Renzulli Tallman, acting in her capacity as administratrix of the estate of Brian Gilbert Tallman, appeals the trial court’s dismissal of this wrongful death action as barred by the statute of limitations. An order extending the time to file the complaint in this action was obtained pursuant to Rule 3 of the Rules of Civil Procedure prior to the running of the statute of limitations, and the complaint was timely filed in accordance with that order. Ms. Tallman was not, however, appointed as administratrix of the estate

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until the day after the filing of the complaint. On appeal, Ms. Tallman argues that under our Supreme Court's decision in *Burcl v. N.C. Baptist Hosp., Inc.*, 306 N.C. 214, 293 S.E.2d 85 (1982), this action is not time-barred since her ratification of this action once she was properly named the administratrix relates back to the issuance of the summons. We agree that *Burcl* squarely controls the outcome of this case, and accordingly we reverse.

Facts

Brian Gilbert Tallman, the decedent, died on 21 December 2004. On 20 December 2006, an application was filed pursuant to Rule 3 of the Rules of Civil Procedure, seeking an extension of the time to file "a wrongful death action involving employees of the Fire Department of the City of Gastonia and other employees and officers for failure to provide appropriate emergency care on December 21, 2004." The plaintiff was identified as the "Estate of Brian Tallman by the Executrix of his Estate, Kellie R. Tallman." On 20 December 2006, the assistant clerk of superior court entered an order allowing the application and granting an extension up to and including 9 January 2007. The application, order, and a civil summons were served on the City on 3 January 2007.

On 8 January 2007, Ms. Tallman filed a wrongful death complaint against the City, again naming the "Estate of Brian Gilbert Tallman, by the Executrix of his Estate, Kelle Renzulli Tallman" as the plaintiff. On 9 January 2007, however, Ms. Tallman applied for and received letters of administration and became the administratrix of the decedent's estate.

The complaint alleged that on 21 December 2004, the decedent suffered a heart attack at his home. His stepson called 911 and began performing CPR. When the first responders arrived, they stopped the stepson from performing CPR and called for the paramedics. During the several minutes that elapsed between the arrival of the first responders and the arrival of the paramedics, no CPR was performed, and no other aid was given to the decedent. The complaint alleged that the decedent died as a result of the first responders' failure to continue CPR or provide oxygen and/or an airway when they knew or should have known such assistance was needed. The complaint further asserted that the City was negligent in failing to properly train and equip its first responders to provide emergency care in emergency medical situations until the paramedics arrive.

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On 12 February 2007, the City moved to dismiss the complaint pursuant to Rules 12(b)(1), (5), and (6) of the Rules of Civil Procedure for failure to state a claim for relief and lack of subject matter jurisdiction. The City contended first that Ms. Tallman “was without legal capacity to present a claim within the time permitted by law, whereby she was not the Executrix of the Estate and further that no Estate existed during the time that an action might be brought pursuant to the laws of this State thereby barring any claims by Plaintiff.” The City alternatively argued that the complaint failed to comply with Rule 9(j) of the Rules of Civil Procedure.

On 29 May 2008, the trial court concluded that “the 12(b)(6) Motion as to a Rule 9(j) certification should be denied, as firefighters acting as First Responders do not appear to [be] contemplated in the 9(j) certification requirement” The court nonetheless granted the motion to dismiss “as the Estate file, 07 E 36, clearly shows that no estate existed on December 20, 2006 when application was made in the name of the estate for a 20-day Extension of Time to file the Complaint, Kelle Renzulli Tallman had no capacity to act, the statute of limitation ran on December 21, 2006, and the Application for Letters was made and Letters for Appointment of a personal representative were issued on January 9, 2007; therefore the December 20, 2006 Application for Extension of Time to File a Complaint is void.” Ms. Tallman timely appealed to this Court.

Discussion

N.C. Gen. Stat. § 1-53(4) (2007) provides that “[a]ctions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another under G.S. 28A-18-2” must be brought within two years of the decedent’s death. N.C. Gen. Stat. § 28A-18-2(a) (2007) further requires:

When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, *to be brought by the personal representative or collector of the decedent*

(Emphasis added.) It is well established that “[a]n action for wrongful death is a creature of statute and only can be brought by the personal representative or collector of the decedent.” *Westinghouse v. Hair*, 107 N.C. App. 106, 107, 418 S.E.2d 532, 533 (1992).

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In this case, the wrongful death action was commenced pursuant to Rule 3(a) of the Rules of Civil Procedure: “A civil action may also be commenced by the issuance of a summons when (1) [a] person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and (2) [t]he court makes an order stating the nature and purpose of the action and granting the requested permission.” There is no dispute that the application for an extension of time was filed prior to the running of the wrongful death statute of limitations and that the complaint was subsequently filed within the time frame allowed by the court’s order granting the Rule 3 application.

The summons, the application, and the complaint ultimately filed, however, all identified the plaintiff as “Estate of Brian Gilbert Tallman by the Executrix of his Estate, Kelle Renzulli Tallman.” The trial court based its dismissal on the fact that Ms. Tallman had not qualified as an administratrix as of the date she filed the summons and application for an extension of time to file the complaint. The question before this Court is whether Ms. Tallman’s appointment as administratrix—the day after the complaint was filed and after the statute of limitations had run—related back to the filing of the summons for statute of limitations purposes.

As this Court explained in *Westinghouse*, 107 N.C. App. at 107, 418 S.E.2d at 533, “[f]or years North Carolina followed a minority rule that when a wrongful death action was not brought in a proper capacity, any attempt to remedy the defect subsequent to the running of the statute of limitations was ineffective to overcome the bar of the statute of limitations.” This rule was subject to the single exception created by the Supreme Court in *Graves v. Welborn*, 260 N.C. 688, 696, 133 S.E.2d 761, 766 (1963), when a plaintiff “in good faith, and with some reason, albeit mistakenly, believed herself to be the duly appointed administratrix of the estate . . . at the time she instituted the suit.” The Supreme Court in *Graves* stressed, however, that it “must not be understood as holding that one who has never applied for letters or who, having applied, had no reasonable grounds for believing that he had been duly appointed, can institute an action for wrongful death, or any other cause, upon a false allegation of appointment and thereafter validate that allegation by a subsequent appointment.” *Id.* at 696-97, 133 S.E.2d at 767.

The law, however, changed significantly with the Supreme Court’s decision in *Burcl*, 306 N.C. at 217, 293 S.E.2d at 87. The cause of this change was the adoption of the Rules of Civil Procedure: “We con-

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clude that present Rules 15 and 17(a) dictate a different result from that which has so far been reached by the Court of Appeals on this question, and which was reached by our cases decided before the enactment of these rules.” *Id.* The cases cited by the City in support of the trial court’s order all predate *Burcl* and were overruled by *Burcl*.

In *Burcl*, the plaintiff, who brought a wrongful death action, had been appointed as the administrator of the decedent’s estate in a state other than North Carolina. At the time she filed the wrongful death action in North Carolina, within the two-year statute of limitations, she had not yet qualified locally as an ancillary administrator—as was required to file the action—and did not do so until after the statute of limitations had run. *Id.* The plaintiff “sought to plead in the trial court to show [that she had qualified locally] and have this pleading relate back to the commencement of the action.” *Id.* at 216, 293 S.E.2d at 86. The Supreme Court began its opinion by noting:

The question is whether such a pleading may be permitted to defeat defendants’ motions to dismiss grounded on the running of the statute of limitations. We recognize that our older cases answered this question negatively; but we believe that our present Rules of Civil Procedure 15 and 17(a) require that such a pleading now be permitted and that the holdings of these older cases be overruled.

Id.

After discussing the history of amendments of complaints in North Carolina, the Court pointed out that Rules 15 and 17 of the Rules of Civil Procedure, adopted in 1967 with amendments added in 1969, were the rules “pertinent to [that] case.” 306 N.C. at 222-23, 293 S.E.2d at 90. According to the Court, “[i]t is at once apparent from the face of Rules 15(c) and 17(a) that they have changed our approach to the problems, respectively, of whether a given pleading relates back to the beginning of the action and how to deal with a claim brought by a party who has no capacity to sue.” *Id.* at 224, 293 S.E.2d at 91.

Rule 15(c) has not been amended since *Burcl* and provides: “A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” The Supreme Court explained

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that “[w]hether an amendment to a pleading relates back under Rule 15(c) depends no longer on an analysis of whether it states a new cause of action; it depends, rather, on whether the original pleading gives ‘notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.’ ” 306 N.C. at 224, 293 S.E.2d at 91 (quoting N.C.R. Civ. P. 15(c)).

Rule 17(a), also not amended in pertinent part since *Burcl*, provides: “No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.” With respect to the changes resulting from Rule 17(a), the Court explained:

No longer is the real party in interest in a case precluded from being made the plaintiff after the statute of limitations has run on a claim timely filed by one who lacked the capacity to sue because he was not the real party in interest. Rather, under Rule 17(a), “a reasonable time [must be] allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.”

306 N.C. at 225, 293 S.E.2d at 91-92 (emphasis added) (quoting N.C.R. Civ. P. 17(a)).

The Court then turned to federal decisions construing Rules 15(c) and 17(a) and pointed out that they had “uniformly held that amendments showing a change in plaintiff’s capacity to maintain the action relate back to the action’s commencement.” 306 N.C. at 226-27, 293 S.E.2d at 93. The Court further noted that “[t]his principle has been specifically applied to wrongful death actions in which the plaintiff had not under applicable state law duly qualified as the personal representative until after the statute of limitations had run on the claim.” *Id.* at 227, 293 S.E.2d at 93. The Court then held that “where, as here, the original pleading gives notice of the transactions and occurrences upon which the claim is based, a supplemental pleading that merely changes the capacity in which the plaintiff sues relates back to the commencement of the action as provided in Rule 15(c).” *Id.* at 228, 293 S.E.2d at 93-94.

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The defendants in *Burcl* argued, however, that until the plaintiff qualified as a North Carolina administrator, she had no authority to invoke the jurisdiction of the court, that the originally-filed claim was a nullity, and that there was nothing to which her amendment showing later qualification could relate back. The Supreme Court, however, *id.* at 229, 293 S.E.2d at 94, pointed to N.C. Gen. Stat. § 28A-13-1 (2007), which even today provides in relevant part: “The powers of a personal representative relate back to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. . . . A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.”¹

Finally, like the City in this case, the defendants in *Burcl* pointed to Rule 9, which requires that a plaintiff specially plead the capacity in which he or she sues, and argued that it controlled over Rule 17. The Supreme Court disagreed, reasoning:

Subsection (a) [of Rule 17] deals specifically with what happens when an action is brought by one who is not the real party in interest. Thus Rule 17(a) speaks to a problem very much like, although not identical to, the one we have here, *i.e.*, what happens when an action is brought by a person who has no capacity to sue. Rule 17(a) permits the real party in interest to ratify the action after its commencement and to have the ratification relate back to the commencement. Indeed, amendments to pleadings which substitute the real party in interest for a person who did not enjoy that capacity when he brought the claim is a more drastic change in the kind of claimant than an amendment which merely changes the capacity in which the same named individual is suing. Rule 17(a) expressly authorizes the former substitution of one party for another. Rule 15, particularly subsection (c), when considered in light of Rule 17(a), just as clearly authorizes the latter change in capacity in which the same plaintiff brings his claim.

306 N.C. at 230, 293 S.E.2d at 94-95.

Because the *Burcl* “[d]efendants had full notice of the transactions and occurrences upon which this wrongful death claim [was] based when the claim was originally filed within the period of limita-

1. The Supreme Court’s rejection of this argument disposes of the trial court’s determination, in this case, that the application for an extension of time was “void.”

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tions by plaintiff in her capacity as a foreign administrator[.],” the Court held they could not establish that allowing the plaintiff to show the change in her capacity through a supplemental pleading under Rule 15 would prejudice them. 306 N.C. at 230, 293 S.E.2d at 95. The Court reasoned that “[t]he purpose served by the statute of limitations—protection against stale claims—[was] in no way compromised by allowing such a pleading to relate back to the action’s commencement.” *Id.* The Court, therefore, reversed and remanded to the superior court for further proceedings. *Id.* at 231, 293 S.E.2d at 95.

Burcl was applied by this Court in *Westinghouse*, 107 N.C. App. at 106-07, 418 S.E.2d at 532, in which the deceased’s personal representative renounced his right to qualify as executor or administrator of the estate and requested that the plaintiff be appointed administratrix. Prior to receiving letters of administration and on the day that the statute of limitations was due to run, the plaintiff filed a wrongful death action on behalf of the estate; two days later, she was issued letters of administration. *Id.* at 107, 418 S.E.2d at 532-33. The plaintiff subsequently filed an amended complaint reflecting that she had brought the action in her representative capacity. As in this case, the defendants successfully moved to dismiss the action on the grounds that it had not been brought by the personal representative within the statute of limitations. *Id.*, 418 S.E.2d at 533.

This Court held that, under *Burcl*, “where the original pleading gives sufficient notice of the transaction and occurrences upon which the claim is based, a supplemental pleading that merely changes the capacity in which the plaintiff sues relates back to the commencement of the action.” 107 N.C. App. at 109, 418 S.E.2d at 534. The Court concluded that since the amended complaint was identical to the original pleading “with the exception of the change of caption to reflect the bringing of the action in the capacity of personal representative,” the defendant was “in no way prejudiced by allowing plaintiff to amend her pleading to show her capacity to sue and having it relate back to the date of the original pleading.” *Id.*

The City argues that *Burcl* and *Westinghouse* are distinguishable from this case because, in each case, the plaintiff had a good faith belief that she qualified as an administratrix and showed excusable neglect. While *Westinghouse* appears almost identical to this case and contains no reference to good faith or excusable neglect, this purported distinction is, in any event, immaterial. In *Burcl*, our Supreme Court acknowledged the exception in *Graves* for good-faith

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mistakes and observed that “[a] strong argument can be made that because plaintiff here brought her action not as an individual, but in her representative capacity as administrator, and believed in good faith that she was duly authorized to bring it, she should under the *Graves* rationale be permitted to amend her pleading to show her local qualification and have it relate back to the commencement of her action.” 306 N.C. at 219, 293 S.E.2d at 88-89. Nonetheless, the Court decided: “We need not, however, rest our decision on this ground, for we are satisfied that Civil Procedure Rules 15 and 17, enacted since *Graves*, require the result reached in that case.” *Id.* at 219, 293 S.E.2d at 89. Thus, *Burcl* recognized that a showing of “good faith” is not required. *Westinghouse* suggests nothing to the contrary.

The City also attempts to distinguish *Burcl* and *Westinghouse* on the ground that, in each of those cases, an “estate had already been opened.” In *Burcl*, there was an estate opened in Virginia, while in *Westinghouse*, another person had previously been named personal representative. The City does not explain, and we cannot see, how this fact makes any difference to the Supreme Court’s and this Court’s analysis in *Burcl* and *Westinghouse*. The question is whether a personal representative brought the wrongful death action within the two-year statute of limitations. The estate was not, and could not be, a party to the action.² *Burcl* and *Westinghouse*, therefore, control with respect to this appeal.

The City also argues that the fact that no estate had been opened upon the filing of the initial application to extend time means that any amendment would constitute a substitution of parties under Rule 15(c) in violation of *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995), and *Reece v. Smith*, 188 N.C. App. 605, 655 S.E.2d 911, *disc. review denied*, 362 N.C. 510, 668 S.E.2d 338 (2008). According to the City, “Plaintiff-Appellant cannot now say that the Complaint, which was filed after the statute of limitations had passed, should be amended under Rule 15(c) to add the newly created estate and its newly appointed administrator as a party because such an amendment would substitute the non-existent estate, which filed the initial application, with the newly created entity.”

2. In addition, as this Court has previously stressed: “It is well established that proceeds from wrongful death actions are not part of a decedent’s estate.” *In re Estate of Parrish*, 143 N.C. App. 244, 248, 547 S.E.2d 74, 76-77, *disc. review denied*, 354 N.C. 69, 553 S.E.2d 201 (2001). In receiving funds obtained as a result of a wrongful death action, “ ‘a personal representative of a decedent’s estate is not acting for the estate but as a trustee for the beneficiaries under the law.’ ” *Id.*, 547 S.E.2d at 77 (quoting *In re Below*, 12 N.C. App. 657, 660, 184 S.E.2d 378, 381 (1971)).

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The City's argument overlooks Rule 17(a), which specifically allows the substitution of parties, as discussed by the Supreme Court in *Burcl*. Moreover, the assumption underlying the City's argument—that an estate is an entity—is contrary to the law. See *Blumenthal v. Lynch*, 315 N.C. 571, 579, 340 S.E.2d 358, 362 (1986) (“The estate of a deceased person is not an entity known to the law, and is not a natural or an artificial person, but is merely a name to indicate the sum total of assets and liabilities of a decedent.” (quoting 33 C.J.S. *Executors and Administrators* § 3(e) (1942))); see also 31 Am. Jur. 2d *Executors and Administrators* § 1118 (2008) (“‘Estates’ are not natural or artificial persons, and they lack legal capacity to sue or be sued, and it is well settled that all actions that survive a decedent must be brought by or against the personal representative.”).

Ms. Tallman originally brought this action in the capacity of Executrix of the Estate of Brian Gilbert Tallman. She subsequently obtained letters of administration and seeks to proceed in her capacity as administratrix of the estate of Brian Gilbert Tallman and as the real party in interest under Rule 17(a). The Supreme Court held in *Burcl* that the relevant inquiry under these circumstances is whether “[d]efendants had full notice of the transactions and occurrences upon which this wrongful death claim [was] based when the claim was originally filed within the period of limitations by plaintiff” 306 N.C. at 230, 293 S.E.2d at 95.

The application for extension of the time to file the complaint advised the City that “[t]his is a wrongful death action involving employees of the Fire Department of the City of Gastonia and other employees and officers for failure to provide appropriate emergency care on December 21, 2004.” This statement provided the City with notice that the lawsuit involved the death of Brian Tallman on 21 December 2004 when employees of the City's Fire Department allegedly failed to provide appropriate emergency care. The notice, therefore, identified the wrongful act—neglect in emergency care—and identified the occurrence by a precise date and the naming of the alleged victim. Although the City asserts that Ms. Tallman provided “no indication of what type of ‘wrongful act, neglect or default of another’ would constitute the wrongful death claim [that] was being alleged,” the City has cited no authority that would suggest greater detail about the alleged inadequate emergency care was required. Further, the City has not pointed to (1) any significant difference between the summons and the complaint that was ultimately filed that caused surprise or (2) any prejudice that the City

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would suffer from not knowing greater detail about the lack of emergency care. We, therefore, hold that the City received the notice required by *Burcl*.

This case and *Burcl* and *Westinghouse* differ in one respect. In this case, Ms. Tallman did not file a motion to amend or a motion to supplement the complaint under Rule 15. We do not believe that this omission leads to a different result than that reached in *Burcl* and *Westinghouse*. Ms. Tallman argues that under *Burcl*, once she became the real party in interest by virtue of her appointment as administratrix of the estate, she ratified the earlier filings, and this ratification relates back to make her complaint timely. Although it might have been clearer had Ms. Tallman filed a motion to supplement pursuant to Rule 15(c) and (d), a leading commentator has noted: “Rule 15(c) has been used in conjunction with Rule 17(a) to enable an amendment substituting the real party in interest to relate back to the time the original action was filed. The same result could have been reached solely on the basis of . . . Rule 17(a).” 6A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice & Procedure* § 1555.

Our courts have held that the real party in interest can, under Rule 17, ratify the commencement of a lawsuit in several ways: (1) by filing a formal notification with the court, *Reeves v. Journey*, 29 N.C. App. 739, 741, 225 S.E.2d 615, 616 (holding that filing of signed document by real parties in interest stating they authorized plaintiff to proceed and agreed to be bound as if they were original plaintiffs was sufficient ratification), *disc. review denied*, 290 N.C. 663, 228 S.E.2d 454 (1976); (2) by stipulation, *Lawrence v. Wetherington*, 108 N.C. App. 543, 547, 423 S.E.2d 829, 831 (1993) (holding that real party in interest could stipulate to court that it would be bound by any decision in case); and (3) by participating in the legal proceedings, *Long v. Coble*, 11 N.C. App. 624, 629, 182 S.E.2d 234, 238 (holding that participation by counsel for real party in interest in legal proceedings was sufficient ratification), *cert. denied*, 279 N.C. 395, 183 S.E.2d 246 (1971). Here, Ms. Tallman’s participation in the lawsuit once she had become administratrix was sufficient under *Long* to ratify the filing of the summons and application for extension of time. That ratification, under Rule 17(a), relates back to the filing of the summons, rendering the wrongful death action timely.

Accordingly, we hold that the trial court erred in granting the City’s motion to dismiss, and we, therefore, reverse. On remand, the case should proceed in the name of the real party in interest,

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Kelle Renzulli Tallman, as the administratrix for the estate of Brian Gilbert Tallman.

Reversed.

Judges STEELMAN and STEPHENS concur.

SHIRLEY A. CASELLA, PLAINTIFF v. RICHARD J. ALDEN, EXECUTOR OF THE
ESTATE OF ROSS R. CASELLA, DECEASED, DEFENDANT

No. COA08-1316

(Filed 15 September 2009)

1. Divorce— equitable distribution—reconciliation prior to death extinguished claim

The trial court did not err by dismissing defendant executor's equitable distribution claim where the trial court properly concluded based on the undisputed objective evidence that the Casellas had resumed marital relations prior to the husband's death. An equitable distribution claim is extinguished by operation of N.C.G.S. § 50-20(1)(1) in these circumstances.

2. Appeal and Error— preservation of issues—mootness

Defendant's arguments in an equitable distribution case directed at an alternative conclusion based on a second method of proof were not addressed because the Court of Appeals upheld the trial court's conclusion as to the first method of proof.

Appeal by defendant from judgment entered 8 April 2008 by Judge Alonzo Brown Coleman, Jr. in Chatham County District Court. Heard in the Court of Appeals 24 March 2009.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene and Tobias S. Hampson; and Alexander & Miller, LLP, by Sydenham B. Alexander, Jr. and Meg K. Howes, for plaintiff-appellee.

The Brough Law Firm, by G. Nicholas Herman, for defendant-appellant.

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GEER, Judge.

Decedent Ross R. Casella and plaintiff Shirley A. Casella were separated when Mr. Casella was diagnosed with untreatable cancer. Subsequently, both Mr. Casella and Ms. Casella sought equitable distribution of their property and a divorce. Prior to any hearing on those issues or any agreement by the spouses, Ms. Casella joined Mr. Casella in his home, where approximately three weeks later Mr. Casella passed away. Defendant Richard J. Alden, the executor of Mr. Casella's estate, appeals from the trial court's judgment that dismissed defendant's equitable distribution claim against Ms. Casella on the grounds that the spouses had reconciled prior to Mr. Casella's death. Because we agree with the trial court that the record contains undisputed objective evidence of reconciliation, we affirm.

Facts

The trial court found the following facts, almost all of which are unchallenged on appeal. The Casellas married on 1 May 1954 and separated on 28 November 2004. They had two children, Rosalyn and John. Prior to their separation, the Casellas were living in Chapel Hill, North Carolina, in a home that they held as tenants by the entirety. After their separation, Mr. Casella moved to New Philadelphia, Ohio, where he resided until his death. Ms. Casella continued to live in their Chapel Hill home after the separation. Mr. Casella visited Ms. Casella in North Carolina approximately eight times in 2005. They would spend time together, including going out to dinner, but Mr. Casella would spend the night in a hotel. Although the timing is unclear, at some point during the separation, Mr. Casella developed a relationship with Carole Eberle, whom he visited in Florida.

In the spring and summer of 2005, Mr. Casella and Ms. Casella divided their joint investment accounts, with each receiving approximately half of the investments. They also equally divided their IRA accounts. The two, however, maintained a joint checking account that they supplemented from their separate accounts for maintaining property they owned together in Pennsylvania, North Carolina, and Florida, as well as paying the premiums for a supplemental health care insurance policy for both Mr. Casella and Ms. Casella.

At the time of their separation, the spouses each retained an attorney to draft separation and property settlement agreements. Although proposed agreements were exchanged, Mr. Casella and Ms. Casella ultimately never entered into an agreement. On 20 January 2006, Ms. Casella filed a complaint for divorce and equitable distribu-

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tion. Mr. Casella filed an answer on 2 March 2006, joining in the request for a divorce and seeking distribution of the marital and divisible property not already divided by agreement.

Mr. Casella was ultimately diagnosed with untreatable cancer and was admitted to the Cleveland Clinic in Ohio in March 2006. He stayed there for several weeks. While in the hospital, Mr. Casella granted a general power of attorney to defendant Richard Alden, his nephew. Ms. Casella traveled to the clinic, stayed in a nearby hotel, and visited Mr. Casella on a daily basis. Ms. Eberle also traveled to Ohio to visit Mr. Casella in the hospital.

Mr. Casella was discharged from the clinic in mid-March and returned to his home in New Philadelphia. Shortly before the discharge, Ms. Casella returned to Chapel Hill. Ms. Eberle initially accompanied Mr. Casella to his home in New Philadelphia, but returned to Florida in late March. On 30 March 2006, Charles D. Harris, a vice president with PNC Bank, visited Mr. Casella at his home to review Mr. Casella's investment accounts and the status of his will. Mr. Harris asked Mr. Casella whether he wanted to change the beneficiary designation on his IRA account, which still listed Ms. Casella as the primary beneficiary. Mr. Casella never changed the beneficiary designation.

After learning that Ms. Eberle had left New Philadelphia, Ms. Casella drove from North Carolina to Ohio to be with Mr. Casella. While Ms. Casella was on her way to Ohio, Mr. Alden telephoned Mr. Casella's attorney in North Carolina, Reid Phillips. Mr. Phillips advised Mr. Alden that reconciliation would have legal implications in the divorce proceedings and that steps should be taken to avoid reconciliation if Mr. Casella did not intend to reconcile.

Ms. Casella arrived at Mr. Casella's home in New Philadelphia on 4 April 2006 and was greeted warmly by everyone there, including Mr. Casella. Ms. Casella spent her first night there sleeping on an inflatable bed adjoined to Mr. Casella's hospital bed. They held hands as they fell asleep.

On either 5 or 6 April 2006, Mr. Alden relayed Mr. Phillips' advice to Mr. Casella. He also went to Mr. Casella's home, inquired whether Ms. Casella was there to reconcile with Mr. Casella, and asked Ms. Casella if she would be willing to sign a written statement that she had no intent to reconcile with Mr. Casella. Ms. Casella called her attorney in North Carolina, who advised her not to sign anything, and, as a result, Ms. Casella did not sign any such statement.

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Later that afternoon, Mr. Casella and Ms. Casella had a private conversation in his bedroom.¹ Following that conversation, Ms. Casella told Mr. Casella that she was willing to get back together with him as his wife. From then on, Mr. Casella and Ms. Casella slept together in the same bed every night until his death on 24 April 2006. Prior to going to sleep each night, they held hands and held each other. Other people living in the home, as well as some visitors, knew that Mr. Casella and Ms. Casella were sleeping in the same bed.

During that time, Ms. Casella, as well as others, provided care to Mr. Casella. She fed and bathed him, helped him move from place to place, tried to make him more comfortable, provided him with medicine and water, helped him to the bathroom, helped the hospice worker change the sheets when he had bowel movements in the bed, and gave him other general care. People staying in the home with Mr. and Ms. Casella and visitors to the home observed Ms. Casella caring for Mr. Casella. Visitors also observed Ms. Casella holding Mr. Casella's hand and saw her almost always at his bedside. The trial court found that "[t]he Plaintiff was observed by visitors as being there as Ross Casella's wife."

Although Mr. Casella was physically very ill, he remained mentally competent until his death. He executed his will on 13 April 2006, naming Mr. Alden as his executor. Ms. Casella was not left any property under the provisions of the will. Mr. Casella died on 24 April 2006.

Ms. Casella visited the funeral home with her son and discussed with the funeral director the casket and flower selections. She also chose the suit and tie in which Mr. Casella was dressed. Ms. Casella greeted guests at the wake and sat with other family in the front row of the church at the funeral service and at the grave-site ceremony. She helped organize a memorial service for Mr. Casella in Pennsylvania at which she again sat in the front row of the church and greeted visitors at a meal after the service.

After Mr. Casella's death, Mr. Alden was substituted as the named defendant in this action. Ms. Casella amended her complaint to omit her claim for equitable distribution, but Mr. Alden asserted a counterclaim for equitable distribution. Ms. Casella filed a reply alleging that Mr. Casella and she "were not living separate and apart at the time of Ross Casella's death, as required by G.S. 50-20(1)(1)[.]"

1. The trial court excluded any testimony by Ms. Casella regarding what Mr. Casella said to her.

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The trial court held a hearing solely on the issue of reconciliation and, in a judgment entered 8 April 2008, concluded that “[b]ased on the substantial objective evidence existing as of the time of Ross Casella’s death, Ross Casella and Plaintiff had as a matter of law resumed their marital relationship and were not therefore living separate and apart at the time of the death.” The court alternatively concluded that “[a]lthough this Court does not believe the objective evidence of reconciliation is in dispute, even assuming so, the parties had the mutual intent (existing at the time of Ross Casella’s death) to reconcile or resume their marital relationship.” Based on its determination that Mr. Casella and Ms. Casella had reconciled, the trial court dismissed defendant’s equitable distribution claim with prejudice. Mr. Alden timely appealed to this Court.

Discussion

[1] Mr. Alden argues on appeal that there is insufficient evidence to support the trial court’s findings of fact and conclusions of law that Ross Casella and Shirley Casella had reconciled at the time of Mr. Casella’s death. When, as here, the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court’s findings of fact and whether those findings of fact supported its conclusions of law. *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004). The trial court’s findings are conclusive on appeal if there is evidence to support them, despite the existence of evidence in the record that might support a contrary finding. *Hand v. Hand*, 46 N.C. App. 82, 87, 264 S.E.2d 597, 599-600, *disc. review denied*, 300 N.C. 556, 270 S.E.2d 107 (1980). The trial court’s conclusions of law, however, are reviewed de novo. *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992).

N.C. Gen. Stat. § 50-20(1)(1) (2007) provides: “A claim for equitable distribution, whether an action is filed or not, survives the death of a spouse so long as the parties are living separate and apart at the time of death.” Thus, an equitable distribution claim is extinguished by operation of N.C. Gen. Stat. § 50-20(1)(1) if, at the time of one of the spouses’ death, the husband and wife had resumed marital relations. N.C. Gen. Stat. § 52-10.2 (2007) sets out the standard for determining whether separated spouses have reconciled: “‘Resumption of marital relations’ shall be defined as voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. Isolated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations.”

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This Court has recognized that “‘[t]here may be a reconciliation and resumption of cohabitation with an intention that it shall be a normal and permanent relationship, even though, despite the intention, the relationship lasts only a short time.’” *Newton v. Williams*, 25 N.C. App. 527, 531, 214 S.E.2d 285, 287 (1975) (quoting 1 *Lee’s North Carolina Family Law* § 35 (3d ed. 1963)). “The method by which a trial court may evaluate whether separated spouses have reconciled is dictated by ‘two lines of cases regarding the resumption of marital relations: those which present the question of whether the parties hold themselves out as [husband] and wife as a matter of law, and those involving conflicting evidence such that mutual intent becomes an essential element.’” *Fletcher v. Fletcher*, 123 N.C. App. 744, 748, 474 S.E.2d 802, 805 (1996) (quoting *Schultz v. Schultz*, 107 N.C. App. 366, 369, 420 S.E.2d 186, 188 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993)), *disc. review denied*, 345 N.C. 640, 483 S.E.2d 706 (1997).

The first method requires the existence of undisputed and “substantial objective indicia of cohabitation as [husband] and wife.” *Schultz*, 107 N.C. App. at 369, 420 S.E.2d at 188. In cases in which such evidence is produced, the trial court may find that the spouses reconciled as a matter of law. *Id.* See also *Oakley*, 165 N.C. App. at 863, 599 S.E.2d at 928 (“[W]here there is objective evidence, that is not conflicting, that the parties have held themselves out as [husband] and wife, the court does not consider the subjective intent of the parties.”). On the other hand, the second method is used when “the facts are in dispute, and the trial court must consider the subjective intent of the parties.” *Schultz*, 107 N.C. App. at 371, 420 S.E.2d at 189.

Defendant first argues that “because all of the objective evidence on the issue of reconciliation was undisputed and nonconflicting, the trial court erred in considering the subjective evidence on the question as part of the basis for the court’s Judgment.” Defendant’s argument is based on the trial court’s conclusion of law in which it states: “Although this Court does not believe the objective evidence of reconciliation is in dispute, even assuming so, the parties had the mutual intent (existing at the time of Ross Casella’s death) to reconcile or resume their marital relationship.”

The trial court was, however, providing alternative bases for its decision in the event of an appeal. As the language of the order indicates, the trial court simply ruled that if it had erred in relying upon the first method for determining whether a reconciliation had oc-

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curred, then it was alternatively concluding based on the second method that resumption of the marital relationship had occurred. *See id.* at 369, 420 S.E.2d at 188 (“[T]hese two lines of cases establish two alternative methods by which a trial court may find that separated spouses have reconciled.”). This approach promotes judicial economy since it means that if this Court disagrees with the trial court that the evidence is undisputed, we are not required to remand for the trial court to apply the second method.

Once the trial court chose to employ the second method as an alternative basis for its ruling, it was required to make the necessary findings of fact to resolve the factual issues and to consider the subjective intent of the parties. Thus, the order contains findings of fact relating to both objective evidence (supporting the conclusion of law relating to the first method) and subjective intent (supporting the conclusion of law relating to the second method). Consequently, contrary to Mr. Alden’s position on appeal, the trial court did not err in including in its order findings of fact regarding subjective intent.

We first address the trial court’s conclusion pursuant to the first method that “[b]ased on the substantial objective evidence existing as of the time of Ross Casella’s death, Ross Casella and Plaintiff had as a matter of law resumed their marital relationship and were not therefore living separate and apart at the time of the death.” We hold that the trial court properly determined that the facts were not in dispute and that the objective evidence established that the Casellas had reconciled as a matter of law.

In re Estate of Adamee, 291 N.C. 386, 393, 230 S.E.2d 541, 546 (1976), is a leading decision on this issue. In *Adamee*, our Supreme Court began by noting the “public policy” that prohibits spouses from maintaining that they are separated when they “continue to live together in the same home—holding themselves out to the public as husband and wife” *Id.* at 391, 230 S.E.2d at 545. The Court explained that “[s]eparation means cessation of cohabitation, and cohabitation means living together as [husband] and wife, though not necessarily implying sexual relations. Cohabitation includes other marital responsibilities and duties.” *Id.* at 392, 230 S.E.2d at 546 (quoting *Young v. Young*, 225 N.C. 340, 344, 34 S.E.2d 154, 157 (1945)). The spouses must live apart in “ ‘such manner that those in the neighborhood may see that the husband and wife are not living together.’ ” *Id.* (quoting *Dudley v. Dudley*, 225 N.C. 83, 86, 33 S.E.2d 489, 491 (1945)). The Court observed:

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“Marriage is not a private affair, involving the contracting parties alone. Society has an interest in the marital status of its members, and when a husband and wife live in the same house and hold themselves out to the world as [husband] and wife, a divorce will not be granted on the ground of separation, when the only evidence of such separation must, in the language of the Supreme Court of Louisiana (in the case of *Hava v. Chavigny*, 147 La. 331, 84 So. 892) ‘be sought behind the closed doors of the matrimonial domicile.’ Our statute contemplates the living separately and apart from each other, the complete cessation of cohabitation.”

Id. (quoting *Dudley*, 225 N.C. at 86, 33 S.E.2d at 491).

The Court then held that “when separated spouses who have executed a separation agreement resume living together in the home which they occupied before the separation, they hold themselves out as [husband] and wife in the ordinary acceptance of the descriptive phrase. Irrespective of whether they have resumed sexual relations, in contemplation of law, their action amounts to a resumption of marital cohabitation which rescinded their separation agreement insofar as it had not been executed.” *Id.* at 392-93, 230 S.E.2d at 546 (internal quotation marks omitted). *See also Schultz*, 107 N.C. App. at 373, 420 S.E.2d at 190 (“When the parties objectively have held themselves out as [husband] and wife and the evidence is not conflicting, we need not consider the subjective intent of the parties.”).

In *Fletcher*, 123 N.C. App. at 750, 474 S.E.2d at 806, this Court noted that the General Assembly, subsequent to *Adamee*, amended N.C. Gen. Stat. § 52-10.2 to provide that a determination whether marital relations were resumed must be based on “the totality of the circumstances.” The Court, therefore, concluded that merely resuming living together in the marital home would not necessarily be sufficient since “[t]o resolve the issue [regarding resumption of marital relations], courts must evaluate all the circumstances of a particular case.” 123 N.C. App. at 750, 475 S.E.2d at 806 (internal quotation marks omitted).

In addressing the merits of the appeal before it, the *Fletcher* panel concluded that factors cited in *Adamee* and *Schultz* as indicative of reconciliation were “noticeably absent in the case *sub judice*.” *Id.* The Court explained:

For example, plaintiff never ‘moved’ back into or resumed cohabitation in the marital home, but instead maintained her separate residence at which she kept her possessions and from which she

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removed only clothing for work. In addition, the time period involved herein was less than a week, compared with the four and eight month time frames involved in *Schultz* and *Adamee* respectively. Further, no evidence in the record reveals the parties resumed the sharing of chores or household responsibilities, that they accompanied each other to public places so as to '[hold] themselves out as husband and wife,' *Adamee*, 291 N.C. at 392, 230 [S.E.2d] at 546, or that they indicated to family and/or friends that their problems had been resolved or that they desired to terminate the separation.

Id. at 750-51, 474 S.E.2d at 806-07. The Court further observed that the evidence instead showed that the parties continued to abide by the terms of the separation agreement and that "defendant's statement that he wished plaintiff to leave because 'he wanted to be with his girlfriend' comprise[d] a compelling indication that no reconciliation with plaintiff occurred." *Id.* at 751, 474 S.E.2d at 807.

In this case, Mr. Alden, to whom Mr. Casella had granted a general power of attorney, learned from Mr. Casella's counsel that Mr. Casella should take steps to avoid reconciliation if Mr. Casella did not wish to reconcile. Although told of this advice, Mr. Casella never took any such steps. Instead, Ms. Casella, after discussing reconciliation with Mr. Casella, began sharing Mr. Casella's bed—a fact the Casellas allowed the hospice worker and other people staying at the house to know. Ms. Casella helped her children and the hospice worker care for Mr. Casella, including wiping him down at night when he had hot flashes, changing sheets soiled with bowel movements, and helping him to the bathroom.

Both of the Casellas told other people that they had reconciled or, as Mr. Casella explained to one friend, they had things "straightened out." The Casellas interacted with each other in front of other people in a manner that suggested to the visitors that they were husband and wife. Although Mr. Casella had recently visited with a girlfriend, she left for Florida prior to the alleged reconciliation, and Mr. Alden points to no evidence of any involvement with that girlfriend once the Casellas discussed reconciliation. In addition, although Mr. Casella was approached by a bank representative about changing his beneficiary from Ms. Casella on an IRA valued at \$1.2 million, Mr. Casella did not do so. Following Mr. Casella's death, Ms. Casella's role in arranging for and participating in the various services was consistent with the role of a wife, including selecting the suit and tie in which Mr. Casella would be buried, sitting in the place normally occupied by

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a wife, receiving the United States flag that draped the coffin, and greeting the mourners.

In short, in contrast with *Fletcher*, the record contains undisputed evidence that the Casellas were cohabiting by sleeping in the same bed, and Ms. Casella had assumed responsibilities for the type of intimate care of Mr. Casella that a wife or child would perform. Although the period of time involved was shorter than that in *Adamee* and *Schultz*, both of the Casellas indicated to friends that they had reconciled. They held themselves out to the public in a manner suggestive of husband and wife, and people interacted with Ms. Casella as if she were Mr. Casella's wife.

Mr. Alden, in arguing that the undisputed evidence "was entirely inconsistent with abrogating their separation and resuming the marital relationship," focuses primarily on the time frame prior to Ms. Casella's drive to Ohio. He points to evidence of the parties' separation and division of property, Mr. Casella's relationship with Ms. Eberle, the efforts to draft a separation and property settlement, and Ms. Casella's taking only two bags of clothes and a makeup case when traveling to Ohio. The trial court, however, found that a change subsequently occurred in the Casellas' relationship:

19. On the afternoon of either the 5th or 6th of April 2006, the Plaintiff and Ross Casella had a private conversation about getting back together. In response to that conversation, the Plaintiff told him she was willing to get back together with him as his wife. Thereafter, and before Ross Casella's death the Plaintiff told others she and Ross Casella had gotten back together as man and wife.

Although defendant assigns error to this finding, it is supported by competent, undisputed evidence.

The relevant time frame is not, therefore, the period during which the parties were unquestionably separated, but rather the time frame after which Ms. Casella contends that they reconciled. For there to be a resumption of marital relations, there necessarily must have been a separation. Thus, in all cases involving this issue, there will be undisputed evidence of separation. The question becomes whether at some time the parties ceased to be separated and resumed their marital relations. The undisputed objective evidence pertinent to that inquiry is the evidence that exists following the date of alleged reconciliation.

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With respect to the time frame relevant in this case—5 or 6 April 2006 through 24 April 2006—Mr. Alden argues that Ms. Casella was not the only one caring for Mr. Casella, but rather she shared that responsibility with their son, John, and the hospice worker. Mr. Alden similarly points to the other family members' involvement, with Ms. Casella, in the funeral and memorial services. Mr. Alden stresses that Ms. Casella simply behaved like their son, John, did. This argument, however, supports the trial court's decision. Ms. Casella was functioning as a family member—as close as a son—and not as someone separated from Mr. Casella and just visiting like other friends. Indeed, Ms. Casella shared the intimate care of Mr. Casella with only their son and a professional health care provider. While other people visiting may also have shown physical affection, visitors perceived the Casellas' interactions as being like husband and wife.

Mr. Alden argues that the testimony of visitors regarding the Casellas' statements about reconciliation and the visitors' "wholly subjective impressions" of the Casellas' interactions should be disregarded as evidence relating only to subjective intent. Mr. Alden cites no authority supporting his contention. To the contrary, *Fletcher* specifically noted, in holding under the first method of proof that no reconciliation occurred, that there was no evidence "that they indicated to family and/or friends that their problems had been resolved or that they desired to terminate the separation." *Fletcher*, 123 N.C. App. at 751, 474 S.E.2d at 807. Further, as discussed above, *Adamee*, *Schultz*, and *Fletcher* all discuss whether the spouses behaved in public in a manner so as to hold themselves out as husband and wife. See also *In re Estate of Archibald Edwards*, 183 N.C. App. 274, 278, 644 S.E.2d 264, 267 (2007) (upholding determination that decedent and appellee reconciled and resumed marital relations based on appellee's affidavit that stated, in part, that the spouses " 'held [themselves] out to [their] families and to the public as being husband and wife' ").

In addition, Mr. Alden relies heavily on the undisputed evidence that Mr. Casella signed his will on 13 April 2006, but did not leave anything to Ms. Casella in the will. Ms. Casella, however, points to the undisputed evidence that the spouses had already divided much of their marital property during their separation, including half of a multi-million dollar IRA. In addition, Mr. Casella had chosen to leave Ms. Casella as the beneficiary for his half of the IRA. See *id.* at 279, 644 S.E.2d at 267 (citing as evidence of reconciliation the fact that decedent, after alleged reconciliation, had named husband as pri-

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mary beneficiary of life insurance policy). Finally, much of the real estate involved was owned by the Casellas as tenants by the entirety. As Ms. Casella points out, Mr. Casella's will only devised property that had not already been given to Ms. Casella or had not passed to Ms. Casella outside the estate. In sum, a very substantial amount of property passed to Ms. Casella regardless of the will.

As N.C. Gen. Stat. § 52-10.2 states and *Fletcher* emphasizes, reconciliation is to be determined “by the totality of the circumstances.” Given all of the other circumstances—including the cohabitation, Ms. Casella's provision of marital care, the statements to friends, the public behavior of the spouses, the substantial amount of property passing to Ms. Casella at Mr. Casella's death outside of the will, and Mr. Alden's failure to point to evidence of any conduct in April, apart from the will, inconsistent with reconciliation—we hold that the trial court properly concluded based on the undisputed objective evidence that the Casellas reconciled.

[2] Mr. Alden's remaining arguments address the trial court's alternative conclusion finding reconciliation based on the second method of proof. Because we have upheld the court's conclusion as to the first method, we need not address Mr. Alden's arguments directed at the second method or Ms. Casella's cross-assignment of error. We, therefore, affirm the order of the trial court.

Affirmed.

Judges McGEE and BEASLEY concur.

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No. COA09-500

(Filed 15 September 2009)

1. Termination of Parental Rights— standard of proof—clear, cogent, and convincing evidence

The trial court did not commit prejudicial error in a termination of parental rights case by identifying the standard of proof used in making its findings of fact as “clear and cogent” where the record revealed that the trial court applied the proper evidentiary standard. Respondent did not challenge the sufficiency of the

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evidence to support any of the factual findings that underlie the trial court's determination that respondent's parental rights to both minor children were subject to termination under N.C.G.S. § 7B-1111(a)(7).

2. Termination of Parental Rights— grounds—abandonment

The trial court did not err in concluding that grounds existed to terminate respondent father's parental rights because the unchallenged findings of fact supported the trial court's conclusion that respondent abandoned the children within the meaning of N.C.G.S. § 7B-1111(a)(7).

3. Termination of Parental Rights— best interests of child— abuse of discretion standard

The trial court did not abuse its discretion by concluding that it would be in the best interests of the juveniles to terminate respondent father's parental rights because the trial court considered the factors required by N.C.G.S. § 7B-1110(a) and respondent did not provide any basis for reversal of the trial court's order.

Appeal by Respondent-Father from orders entered 3 February 2009, *nunc pro tunc* to 9 January 2009, by Judge Charles Bullock in Harnett County District Court. Heard in the Court of Appeals 24 August 2009.

Laura C. Brennan, PLLC, by Laura C. Brennan, for petitioner-appellee mother.

Ryan McKaig, for respondent-appellant father.

ERVIN, Judge.

Jose D., Respondent-Father, appeals from orders terminating his parental rights in M.D. ("Michelle")¹ and N.D. ("Natalya").² After careful consideration of the record and briefs in light of the applicable law, we affirm the trial court's orders.

Shannon W. (Petitioner-Mother) and Respondent-Father are the parents of Michelle and Natalya. Petitioner-Mother and Respondent-

1. "Michelle" is a pseudonym that will be used throughout the remainder of this opinion in order to preserve the juvenile's privacy and for ease of reading.

2. "Natalya" is also a pseudonym that will be used throughout the remainder of this opinion in order to preserve the juvenile's privacy and for ease of reading.

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Father were married on 8 March 1996; separated in August 2000; and divorced on 9 August 2002. Michelle and Natalya, who are twins, were the only children born of the marriage. In February 2003, Petitioner-Mother married Timothy J. W. Petitioner-Mother and Timothy J. W. have one child. At all times after separating from Respondent-Father in August 2000, Respondent-Mother has had physical custody of Michelle and Natalya. On 2 September 2005, Judge Paul Gessner entered an order in the Wake County District Court awarding legal and physical custody of Michelle and Natalya to Petitioner-Mother and providing that Respondent-Father was “entitled to only supervised visitation with the minor children.”

On 11 April 2008, Petitioner-Mother filed a petition seeking the entry of an order terminating Respondent-Father’s parental rights in Michelle and Natalya. Petitioner-Mother sought this relief on two different grounds. First, Respondent-Mother alleged that Respondent-Father had willfully abandoned both children for at least six consecutive months immediately preceding the filing of the petition, so that Respondent-Father’s parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). More specifically, Petitioner-Mother alleged that, since legal custody of Michelle and Natalya had been awarded to her on 2 September 2005, Respondent-Father had “taken no other steps or made no other acts [sic] which would demonstrate any filial affection for the children, except to contact [Petitioner-Mother] after he was arrested for non[-]payment of child support in March 2007.” Secondly, Petitioner-Mother alleged that Respondent-Father had failed to provide child support for over one year prior to the filing of the petition, so that Respondent-Father’s parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(4). More specifically, Petitioner-Mother alleged that Respondent-Father was subject to an order requiring him “to provide child support for the minor children in the amount of \$350.00 a month, which includes his arrears payment[,]” and that he had failed to comply with this court-ordered child support obligation.

Petitioner-Mother’s termination petition was heard before the trial court on 14 November 2008 and 9 January 2009. The trial court entered separate orders terminating Respondent-Father’s parental rights in both Michelle and Natalya on 3 February 2009, *nunc pro tunc* to 9 January 2009. In its order with respect to Respondent-Father’s parental rights in Natalya, the trial court concluded that his parental rights were subject to termination for failure to pay child support pursuant to N.C. Gen. Stat. § 7B-1111(a)(4). Moreover, the

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trial court found that Respondent-Father's parental rights in both Michelle and Natalya were subject to termination for abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7).³ Finally, the trial court concluded that it was in the best interests of both Michelle and Natalya that Respondent-Father's parental rights be terminated. Following the entry of the trial court's termination orders, Respondent-Father noted an appeal to this Court.

[1] Respondent-Father's first challenge to the trial court's termination orders is that the trial court failed to correctly identify the standard of proof used in making its findings of fact, effectively precluding this Court from determining that those findings were made on the basis of the "clear, cogent and convincing evidence" standard required by N.C. Gen. Stat. § 7B-1109(f). After carefully reviewing the entire record, we conclude that the trial court did not commit prejudicial error as alleged by Respondent-Father.

According to well-recognized provisions of North Carolina law, proceedings to consider petitions seeking the termination of parental rights are conducted in two phases: (1) the adjudication phase and (2) the dispositional phase. *In re Baker*, 158 N.C. App. 491, 581 S.E.2d 144 (2003). In the adjudication stage, the petitioner must prove by *clear, cogent, and convincing* evidence the existence of one or more of the grounds for termination. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984), *later proceeding on other grounds*, 77 N.C. App. 709, 336 S.E.2d 136 (1985); *see also* N.C. Gen. Stat. § 7B-1109(f) (stating that "all findings of fact shall be based on clear, cogent, and convincing evidence"). The trial court is required to "affirmatively state in its order the standard of proof utilized in [a] termination proceeding." *In re Church*, 136 N.C. App. 654, 657, 525 S.E.2d 478, 480 (2000).

In the written orders entered in these proceedings, the trial court stated that Petitioner-Mother had proven the allegations set out in the petitions seeking the termination of Respondent-Father's parental rights by "clear and cogent evidence[.]" Respondent-Father argues that this standard is substantively different from the "clear, cogent, and convincing evidence" required by N.C. Gen. Stat. § 7B-1109(f). Assuming *arguendo* that there is a substantive difference between "clear and cogent" and "clear, cogent, and convincing," we conclude

3. The trial court declined to terminate Respondent-Father's parental rights in Michelle for non-payment of child support because he was not subject to any order requiring him to make payments for her support given her status as a Medicaid recipient.

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that the trial court's use of "clear and cogent" did not constitute prejudicial error in this case given that the record when viewed in its entirety clearly reveals that the trial court applied the proper evidentiary standard and given that Respondent-Father has not challenged any of the trial court's factual findings relating to the grounds for termination set out in N.C. Gen. Stat. § 7B-1111(a)(7) as lacking in adequate evidentiary support.

At the conclusion of the termination hearing, the trial court stated in open court that Petitioner-Mother had "provided . . . clear, cogent, and convincing " evidence that Respondent-Father's parental rights in Natalya were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(4) and that Respondent-Father's parental rights in Michelle and Natalya were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). Although the trial court should have stated in its written termination order that it utilized the standard of proof specified in N.C. Gen. Stat. § 7B-1109(f), the fact that the trial court orally indicated that it employed the appropriate standard and the fact that the language actually used by the trial court is reasonably close to the wording that the trial court should have employed satisfies us that the trial court did, in fact, make its factual findings on the basis of the correct legal standard. *See In re Church*, 136 N.C. App. at 657, 525 S.E.2d at 480. Our confidence that the trial court's failure to state the required standard of proof with perfect precision in its written termination order did not prejudice Respondent-Father is reinforced by our observation that the basic facts underlying the trial court's decision, as compared to the inferences to be drawn from those facts, do not appear to have been in sharp dispute between the parties. In addition, a careful examination of Respondent-Father's brief demonstrates that he has not challenged the sufficiency of the evidence to support any of the factual findings that underlie the trial court's determination that Respondent-Father's parental rights in both Michelle and Natalya were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). As a result, we conclude that the trial court did not commit prejudicial error by failing to state in its written termination order that its factual findings were based on "clear, cogent and convincing evidence."

[2] Next, Respondent-Father argues that the trial court erred by concluding that his parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(4) and (7). In essence, Respondent-Father challenges the adequacy of the trial court's factual findings to support its determination that grounds for terminating his parental

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rights in both Michelle and Natalya existed. After carefully reviewing the record in light of the applicable law, we disagree.

A finding that any one of the grounds for the termination of a parent's parental rights in a juvenile enumerated in N.C. Gen. Stat. § 7B-1111 existed is sufficient to support a decision to terminate that parent's parental rights. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D., D.M.D., S.J.D., J.M.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9, 10 (2001)). We apply this standard in evaluating Respondent-Father's challenge to the trial court's determination that his parental rights in Michelle and Natalya were subject to termination.

The trial court found that Respondent-Father's parental rights in both Michelle and Natalya were subject to termination on the grounds of abandonment. According to N.C. Gen. Stat. § 7B-1111(a)(7), a parent's parental rights in a juvenile are subject to termination if "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion" This Court has indicated that a trial court's inquiry into whether a parent has abandoned a child for purposes of N.C. Gen. Stat. § 7B-1111(a)(7) should focus on the extent to which the respondent parent has engaged in

wilful neglect and refusal to perform the natural and legal obligations of parental care and support [I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

In re Humphrey, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003) (quoting *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citing *In re Davidson's Adoption*, 44 N.Y.S.2d 763 (1943))). Since Petitioner-Mother's petition to terminate Respondent-Father's parental rights in Michelle and Natalya was filed on 11 April 2008, the relevant six-month period specified in N.C. Gen. Stat. § 7B-1111(a)(7) for purposes of this case ran from 11 October 2007 to 11 April 2008.

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In both termination orders, the trial court found as a fact that:

[Petitioner-Mother] has sole legal and physical custody of [Michelle and Natalya] by a custody order entered by the Honorable Paul G. Gessner of the Wake County District Court on September 2, 2005 following a February 28, 2005 hearing on both parties' claims for permanent custody. . . . [Respondent-Father] was awarded supervised visitation.

[Petitioner-Mother] lived in Cary, NC from 2002-2004. [Respondent-Father] had the address.

[Petitioner-Mother] moved to Wake Forest, NC after her marriage to [Timothy J. W.] and the birth of her youngest child. [Respondent-Father] had the address.

[Petitioner-Mother] moved to Buies Creek, NC in 2006 but did not notify [Respondent-Father] since she had not heard from him in about a year.

[Petitioner-Mother] has had the same telephone number since she moved from Ohio to North Carolina in 2002.

[Respondent-Father] has had this telephone number since [Petitioner-Mother] moved from Ohio to North Carolina in 2002.

In addition, in the order terminating Respondent-Father's parental rights in Michelle, the trial court found as a fact that:

5. [Michelle] currently receives services in a nursing home facility, Hilltop Home, Raleigh, North Carolina. The juvenile is non-verbal and non-ambulatory since May 2000.

. . . .

19. [Respondent-Father] has had the ability and ample opportunity to visit with [Michelle] at Hilltop Home. The only limitation on [Respondent-Father's] visitation has been the nursing home's policy of notifying [Petitioner-Mother] when [Respondent-Father] visited. [Respondent-Father] has visited [Michelle] four (4) times since her placement in the nursing home in 2002.

20. [Respondent-Father] did not visit with [Michelle] from 2005 and after the entry of the custody Order . . . until 2008. In 2008, [Respondent-Father] visited with [Michelle] once despite the fact he was in Raleigh, NC at least five (5) times.

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21. [Respondent-Father] did not maintain contact with [Michelle] following the entry of the custody Order . . . because he had a car accident on April 4, 2005 in High Point, NC, was hospitalized for two (2) weeks, and reports that his life “was a mess.”
22. [Respondent-Father] was arrested in March 2007 for violating the support order for [Natalya], [Michelle’s] twin sister. [Respondent-Father] contacted [Petitioner-Mother] on her phone for the first time since 2005 following his arrest to ask for visitation with [Natalya]. [Petitioner-Mother] responded that she would need to confer with her attorney. [Respondent-Father] has not had any further contact with [Petitioner- Mother] for at least a year and a half.
23. [Respondent-Father] has not sent [Michelle] any cards, letters or gifts to the Hilltop Home.

. . . .

29. At all times since 2002, Respondent has had the ability to make reasonable inquiry of [Petitioner-Mother] into [Michelle’s] condition, needs and expenses and has failed to do so.

In the order terminating Respondent-Father’s parental rights in Natalya, the trial court found as a fact that:

17. [Respondent-Father] did not visit with [Natalya] since at least 2005 and the entry of the custody Order. . . .
18. [Respondent-Father] has not talked to [Natalya] on the phone for at least three years.
19. [Respondent-Father] did not maintain contact with [Natalya] after 2005 because he had a car accident on April 4, 2005 in High Point, NC, was hospitalized for two (2) weeks, and reports that his life “was a mess.”
20. [Respondent-Father] was arrested in March 2007 for non-payment of child support. [Respondent-Father] contacted [Petitioner-Mother] on her phone for the first time since 2005 and asked for visitation. [Petitioner-Mother] responded that she would need to confer with her attorney. [Respondent-Father] has not had any further contact with [Petitioner-Mother] for at least a year and a half.

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21. [Respondent-Father] has not sent [Natalya] any cards, letters or gifts since at least 2005.

Respondent-Father has not challenged any of the above findings of fact made by the trial court as lacking adequate evidentiary support. As a result, these findings of fact are deemed to be supported by sufficient evidence and are binding on appeal. N.C.R. App. P. 28(b)(6); *see also In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404-05 (2005) (concluding respondent had abandoned factual assignments of error when she “failed to specifically argue in her brief that they were unsupported by evidence”).

Respondent-Father contends on appeal that the “biggest factor” leading to his status as an absentee parent was the successful efforts of Petitioner-Mother, motivated by a number of factors, “to shut him out of the children’s lives.” In addition, Respondent-Father contends that his recent actions demonstrate that he did not intend to abandon his relationship with his children. However, as is evidenced by its undisputed factual findings, the trial court considered and rejected these arguments. The trial court specifically found that the only limitation on Respondent-Father’s ability to visit with Michelle was Hilltop Home’s policy of notifying Petitioner-Mother when Respondent-Father visited. Despite this liberal visitation policy, Respondent-Father visited Michelle only once after the entry of the 2005 custody order. Furthermore, the trial court found that Respondent-Father failed to inquire about Michelle’s “condition, needs and expenses” despite having the ability to do so. The trial court’s unchallenged findings of fact demonstrate that Respondent-Father has not seen Natalya since 2005 and had not spoken to her by phone in at least three years despite the fact that he could have made contact with Natalya had he wished to do so. Finally, the undisputed evidence establishes, as the trial court found, that Respondent-Father failed to provide either Michelle or Natalya with any cards, letters or gifts after 2005. Based on these unchallenged findings of fact, the trial court had ample justification for concluding that Respondent-Father’s conduct was willful and that he had “withheld his presence, his love, his care, and the opportunity to display filial affections for the juvenile[s]” during the relevant six-month period. As a result, we hold that the trial court did not err in concluding that Respondent-Father’s parental rights in both Michelle and Natalya were subject to termination for abandonment pursuant to N.C. Gen. Stat. §7B-1111(a)(7).

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Respondent-Father also argues that the trial court erred by concluding that his parental rights in Natalya were subject to termination for non-payment of child support pursuant to N.C. Gen. Stat. § 7B-1111(a)(4). However, since we have upheld the trial court's determination that Respondent-Father's parental rights in both Michelle and Natalya were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), we need not examine whether the trial court correctly found that other grounds for terminating Respondent-Father's parental rights in one or both of the children existed as well. *Taylor*, 97 N.C. App. at 64, 387 S.E.2d at 233-34.

[3] Finally, Respondent-Father challenges the trial court's conclusion that the best interests of the juveniles would be served by terminating his parental rights. After careful review of the record and briefs, we find that there is no error in the dispositional component of the trial court's termination order.

"The trial court has discretion, if it finds that at least one of the statutory grounds exists, to terminate parental rights upon a finding that it would be in the [juvenile's] best interests." *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001), *subsequent appeal*, 170 N.C. App. 196, 613 S.E.2d 531 (2005), 182 N.C. App. 175, 641 S.E.2d 417 (2007) (internal citations omitted). In determining whether terminating a parent's parental rights would be in the juvenile's best interests, the trial court is required to consider: (1) the age of the juvenile; (2) the likelihood of adoption; (3) the impact of terminating the parent's parental rights on the accomplishment of the permanent plan for the juvenile; (4) the bond between the juvenile and the parent; (5) the relationship between the juvenile and a proposed adoptive parent or other permanent placement; and (6) any other relevant consideration. N.C. Gen. Stat. § 7B-1110(a). The trial court is to take that action at the dispositional stage of a termination proceeding "which is in the best interests of the juvenile" when "the interests of the juvenile and those of the juvenile's parents or other persons are in conflict." N.C. Gen. Stat. § 7B-1100(3). The trial court's decision at the dispositional phase of a termination of parental rights proceeding is a discretionary determination that will not be disturbed on appeal unless it is so arbitrary that it could not have been the product of reasoned decision-making. *In re J.B.*, 172 N.C. App. 747, 751, 616 S.E.2d 385, 387, *aff'd*, 360 N.C. 165, 622 S.E.2d 495 (2005).

A careful review of the trial court's termination orders demonstrates that it considered the factors required by N.C. Gen. Stat.

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§ 7B-1110(a) in making its termination decision. In its order terminating Respondent-Father's parental rights in Michelle, the trial court found as a fact that:

34. [Michelle] has special needs.
35. [Respondent-Father] has not shown any intention or desire to meet the special needs of [Michelle].
36. [Michelle] responds to Timothy J. W., who acts like a father to her and has assumed the duties of a father.
37. [Michelle] is in need of a stable plan and a care plan should circumstances prevent [Petitioner-Mother], who has been [Michelle's] sole source of support for all expenses not covered by Medicaid.
38. Timothy J. W. would like to adopt [Michelle] and assume all of the rights as well as the obligations as the father of [Michelle].
39. There is a high likelihood that [Michelle] will be adopted by Timothy J. W. and in order to proceed to adoption, it is necessary to terminate the [Respondent-Father's] parental rights.

In its order terminating Respondent-Father's parental rights in Natalya, the trial court found as a fact that:

31. [Natalya] remembers very little about [Respondent-Father].
32. [Natalya] remembers going to the State Fair with [Respondent-Father].
33. It is emotionally difficult for [Natalya] not to know whether she has a father and when or whether she is going to see him. [Natalya] is stressed by the lack of communication by her father.
34. [Natalya] responds to Timothy J. W., who acts like a father to her and has assumed the duties of a father.
35. [Natalya] does not have a close bond with [Respondent-Father].
36. [Natalya] does have a close bond with Timothy J. W.

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37. [Natalya] is in need of a stable plan and desires a father.
38. Timothy J. W. would like to adopt [Natalya] and assume all of the rights as well as the obligations as the father of [Natalya].
39. There is a high likelihood that [Natalya] will be adopted by Timothy J. W. and in order to proceed to adoption, it is necessary to terminate [Respondent-Father's] parental rights.

Based on these findings of fact, we can see no abuse of discretion in the trial court's decision that Respondent-Father's parental rights in Michelle and Natalya should be terminated. The only arguments that Respondent-Father has advanced in opposition to the trial court's dispositional decision are contentions that the children are currently in stable placements, that adoption by their stepfather would not result in any appreciable change in the children's lives, and that the only effect of the trial court's termination order will be to eliminate any possibility that Respondent-Father will be able to reestablish a relationship with Michelle and Natalya. Such arguments do not, however, provide any basis for an appellate reversal of the trial court's order, since it is supported by adequate findings of fact and conclusions of law and is the product of a reasoned decision-making process. As a result, we conclude that the trial court did not commit an error of law at the dispositional phase of this consolidated termination of parental rights proceeding.

Thus, for all of the reasons set forth above, we conclude that the trial court's orders terminating Respondent-Father's parental rights in Michelle and Natalya are free from prejudicial error. As a result, both orders should be, and hereby are, affirmed.

Affirmed.

Judges Stephens and Stroud concur.

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STATE OF NORTH CAROLINA v. LAMONT DERRELL CARTER

No. COA07-1156-2

(Filed 15 September 2009)

1. Search and Seizure— warrantless search—incident to arrest exception—automobile—papers on seat

The search incident to arrest exception for warrantless searches and seizures did not apply to papers seized from the passenger seat of a vehicle where defendant was not within reaching distance of the passenger compartment of his vehicle at the time of arrest, nor was it reasonable for the officer to believe defendant's vehicle contained evidence of either offense for which he was arrested.

2. Search and Seizure— warrantless search—plain view doctrine—automobile—papers on seat

The plain view doctrine did not apply to papers seen by the officer on the seat of a car during a traffic stop that lead to an arrest. The officer did not immediately ascertain from plain view examination that the papers constituted evidence of a crime or contraband, and his suspicion that defendant was trying to conceal information on the papers was not sufficient to bypass the warrant requirement of the Fourth Amendment.

Appeal by defendant from order entered 31 January 2007 by Judge Ronald L. Stephens in Wake County Superior Court. Heard in the Court of Appeals 19 March 2008. Judgment vacated and remanded from the Supreme Court of the United States on 4 May 2009 upon defendant's petition for writ of certiorari.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Thomas J. Pitman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellant Defender Benjamin Dowling-Sendor, for defendant-appellant.

HUNTER, Robert C., Judge.

Lamont Derrell Carter ("defendant") appeals from the trial court's denial of his motion to suppress evidence obtained during a warrantless search of his vehicle subsequent to arrest. Defendant asserts that the search did not fall within one of the exceptions for warrant-

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less searches and thus violated his rights under the Fourth Amendment of the United States Constitution.

When this Court previously decided this case, we found no constitutional violation and affirmed the trial court's order. *See State v. Carter*, 191 N.C. App. 152, 661 S.E.2d 895, *disc. review denied*, — N.C. —, 668 S.E.2d 341 (2008). Defendant subsequently appealed to the Supreme Court of the United States by writ of certiorari. On 4 May 2009, the Supreme Court vacated this Court's opinion and remanded for further consideration in light of its recent decision in *Arizona v. Gant*, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). After careful review, and pursuant to the holding in *Gant*, we find the search of defendant's car to be unlawful and therefore find that the trial court erred in denying defendant's motion to suppress. Accordingly, we vacate the judgment and remand to the trial court for further proceedings not inconsistent with this opinion.

Background

At the suppression hearing, the State's evidence tended to show that on 3 September 2003, Officer J.J. Yardley ("Officer Yardley") of the Raleigh Police Department was on patrol near the intersection of Longstreet and Stuart Streets, an area well known for criminal activity, including the sale of drugs. Officer Yardley was in a marked police cruiser, looking for vehicles not coming to a complete stop at the stop signs at the intersection and using a radar gun to enforce the twenty-five miles per hour speed limit. Around 1:30 a.m., Officer Yardley noticed defendant approaching a stop sign at the intersection in his vehicle. According to Officer Yardley's testimony, defendant then began turning right, which would have taken him toward the police cruiser; however, when his headlights fell on the police cruiser, defendant hesitated and then turned left, taking him away from the police cruiser. Officer Yardley then began to follow defendant. While following defendant, Officer Yardley noticed that defendant's registration for a temporary tag was old or worn. Officer Yardley activated his blue lights and pulled defendant over.

Officer Yardley approached the vehicle from the passenger side and asked defendant for his license and registration, which defendant gave him. Officer Yardley observed that the address on defendant's registration for the temporary tag did not match defendant's address on his driver's license and that the registration for the temporary tag had expired on 25 August 2003. Officer Yardley also observed several

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whole pieces of paper lying on the passenger seat of the car and noticed that defendant seemed unusually nervous.

Officer Yardley returned to his police cruiser to call for backup before he initiated a full custody arrest of defendant. Officer Yardley decided to arrest defendant because of the late hour, defendant's evasive maneuver while driving, his nervousness during the stop, and ultimately, defendant's expired registration tag and the inconsistencies in defendant's addresses. Officer Yardley waited in his cruiser for backup to arrive, at which point he placed defendant under arrest for having an expired tag and for failing to notify the Division of Motor Vehicles of a change in address.

Subsequent to defendant's arrest, Officer Yardley conducted a search of defendant's car, during which he noticed that the papers in the passenger seat had been ripped into smaller pieces. Officer Yardley then began to piece the papers back together, at which point he was able to determine that one of them was a change of address form for an American Express Card belonging to Eric M. White. Officer Yardley questioned defendant about the papers, and defendant replied that they were " 'personal stuff.' " Yardley also asked who Eric White was, and defendant stated that he did not know what Yardley was talking about. After defendant was taken to jail, the remaining papers were pieced together and turned over to investigators.

Before trial, defendant made a motion to suppress the evidence obtained from the stop. The trial court denied the motion. On the basis of the papers and other evidence, defendant was charged with being an accessory after the fact to murder, financial identity fraud, and having attained habitual felon status. Defendant pled guilty to these charges, reserving the right to appeal the order denying his motion to suppress. He was sentenced to 522 months imprisonment. Defendant appealed the order denying his motion to suppress, and this Court affirmed the trial court's ruling on 17 June 2008. We now revisit the issue in light of the Supreme Court's recent decision in *Arizona v. Gant*.

Analysis

Defendant's sole argument on appeal is that the papers seized in the search by Officer Yardley should have been suppressed because they were obtained through an illegal search and seizure. We agree.

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The scope of this Court's review on appeal of a trial court's ruling on a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982); *see also State v. Barden*, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). A trial court's conclusions of law are reviewable *de novo*. *State v. Barnhill*, 166 N.C. App. 228, 230, 601 S.E.2d 215, 217, *cert. denied*, 359 N.C. 191, 607 S.E.2d 646 (2004).

Contained in the trial court's order are the following conclusions of law: "[t]he papers initially seen in [1] plain view and later seized [2] pursuant to the arrest of the [d]efendant and [3] the search of his vehicle were seized lawfully and constitutionally[.]" Defendant argues that the papers were unlawfully seized because the search was conducted without a warrant and neither the search incident to arrest nor the plain view exceptions to the warrant requirement applied under the circumstances.

The following findings of fact are undisputed: defendant changed direction when he saw officer Yardley's police vehicle at the intersection; the area was a "moderately high crime area"; Officer Yardley began to follow defendant based on "the time of the day, the area, and the movement of the vehicle"; Officer Yardley observed that defendant's vehicle had an old or worn temporary tag with an obscured expiration date; and Officer Yardley determined that defendant's temporary registration and plate expired on 25 August 2003. Defendant did not assign error to these findings; thus, they are binding on appeal. *See, e.g., State v. Pendleton*, 339 N.C. 379, 389, 451 S.E.2d 274, 280 (1994), *cert. denied*, 515 U.S. 1121, 132 L. Ed. 2d 280 (1995). Officer Yardley testified that he decided to arrest defendant based on these facts, as well as defendant's nervousness during their conversation.

A. Search Incident to Arrest

[1] When we previously considered the disputed conclusions of law in this case, we upheld the trial court's denial of defendant's motion to suppress based solely on the search incident to arrest exception to the warrant requirement, which provides:

Generally, warrantless searches are presumed to be unreasonable and therefore violative of the Fourth Amendment of the United States Constitution. However, a well-recognized exception to the

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warrant requirement is a search incident to a lawful arrest. Under this exception, if the search is incident to a lawful arrest, an officer may “conduct a warrantless search of the arrestee’s person and the area within the arrestee’s immediate control.”

State v. Logner, 148 N.C. App. 135, 139, 557 S.E.2d 191, 194 (2001) (citations and quotation omitted). The landmark case of *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768 (1981), extended a search incident to a lawful arrest to vehicles and held that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” *Id.* at 460, 69 L. Ed. 2d at 775. This Court relied on *Belton* and its extensive progeny to justify the search and seizure of evidence in defendant’s vehicle incident to his lawful arrest. *See, e.g., State v. Brooks*, 337 N.C. 132, 144, 446 S.E.2d 579, 587 (1994) (“If officers have probable cause to arrest the occupants, they may search—incident to that arrest—the entire interior of the vehicle, including the glove compartment, the console, or any other compartment, whether locked or unlocked, and all containers found within the interior.”); *State v. Wrenn*, 316 N.C. 141, 147, 340 S.E.2d 443, 448 (1986) (“Once the officer made a lawful arrest in this case, he was authorized to search the passenger compartment of the vehicle.”); *State v. VanCamp*, 150 N.C. App. 347, 352, 562 S.E.2d 921, 926 (2002) (“Our appellate courts recognize the authority of an officer to search, incident to an arrest, the entire interior of the vehicle, including the glove compartment, console, or other interior compartments.”); *State v. Fisher*, 141 N.C. App. 448, 455, 539 S.E.2d 677, 682 (2000) (“It is well established that ‘[i]f officers have probable cause to arrest the occupants [of a vehicle], they may search—incident to that arrest—the entire interior of the vehicle’”) (citation omitted) (first alteration added).

Since our prior decision in this case, the Supreme Court of the United States has clarified its previous holding in *Belton* and struck down the broad reading of that decision on which so many courts in recent decades have relied. A broad reading of *Belton* would give police officers unlimited authority to search the passenger compartment of an automobile incident to its recent occupant’s arrest, regardless of the arrestee’s proximity to the vehicle. However, the Court held in *Arizona v. Gant* that “*Belton* does not authorize a vehicle search incident to a recent occupant’s arrest after the arrestee has been secured and cannot access the interior of the vehicle.” *Gant*, 129 S. Ct. at 1714, 173 L. Ed. 2d at 491.

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The Court noted that *Belton* was never intended to overrule *Chimel v. California*, 395 U.S. 752, 23 L. Ed. 2d 685 (1969). “Under *Chimel*, police may search incident to arrest only the space within an arrestee’s immediate control, meaning the area from within which he might gain possession of a weapon or destructible evidence. The safety and evidentiary justifications underlying *Chimel*’s reaching-distance rule determine *Belton*’s scope.” *Gant*, 129 S. Ct. at 1714, 173 L. Ed. 2d at 491. Therefore, *Belton* did not overrule *Chimel*, it merely extended the permissible search area to automobiles and provided a “workable definition of ‘the area within the immediate control of the arrestee’ when that area arguably includes the interior of an automobile.” *Belton*, 453 U.S. at 460, 69 L. Ed. 2d at 774 (citation omitted).

The Court in *Gant* goes on to set out a two-prong test under which “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or* it is reasonable to believe the vehicle contains evidence of the offense of arrest.” *Gant*, 129 S. Ct. at 1723-24, 173 L. Ed. 2d at 501 (emphasis added).

In *Gant*, two police officers intended to arrest the defendant after coming in contact with him at a private residence, later conducting a records check on him, and discovering that there was an outstanding warrant for his arrest for driving with a suspended license. *Id.* at 1714-15, 173 L. Ed. 2d at 491. Upon returning to the residence where they previously saw the defendant, the officers arrested two other individuals for providing a false name and for possession of drug paraphernalia. *Id.* at 1715, 173 L. Ed. 2d at 491-92. Those individuals were handcuffed and secured in separate patrol cars. *Id.* at 1715, 173 L. Ed. 2d at 492. The officers then observed the defendant drive up to the residence, park, and exit his vehicle. *Id.* He was immediately arrested for the crime of driving with a suspended license, handcuffed, and secured in the back of a patrol car while officers proceeded to search his vehicle incident to the arrest. *Id.* Pursuant to their search, the officers found a gun and a bag of cocaine in a jacket pocket on the backseat, giving rise to charges of possession of a narcotic for sale and possession of drug paraphernalia. *Id.* *Gant* filed a motion to suppress, claiming that the evidence was the product of an unlawful search. *Id.* *Gant*’s motion was denied by the trial court. *Id.* On appeal, the Arizona Supreme Court reversed the lower court’s decision and held that defendant’s motion to suppress should have been granted because “the search of *Gant*’s car was unreasonable within the meaning of the Fourth Amendment.” *Id.*

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The Supreme Court of the United States upheld the Arizona Supreme Court's decision stating: "Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case." *Id.* at 1719, 173 L. Ed. 2d at 496. The Court compared *Gant*'s case with the facts presented in *Belton* and *Thornton*¹ and reasoned, "[w]hereas *Belton* and *Thornton* were arrested for drug offenses, *Gant* was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of *Gant*'s car." *Id.*

In announcing the evidentiary prong of the *Gant* test, the Court acknowledged that "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." *Id.*; see also *Atwater v. Lago Vista*, 532 U.S. 318, 324, 149 L. Ed. 2d 549, 558-59 (2001); *Knowles v. Iowa*, 525 U.S. 113, 118, 142 L. Ed. 2d 492, 498-99 (1998).

A comparison of the present case with the facts of *Gant* indicates that the warrantless search of defendant's vehicle cannot be justified under either prong of *Gant*'s test. In the case *sub judice*, defendant had been removed from the vehicle, handcuffed, and directed to sit on a curb at the time the vehicle was searched. There is no reason to believe defendant was within reaching distance or otherwise able to access the passenger compartment of the vehicle when the search commenced. Thus, the warrantless search of defendant's vehicle cannot be justified under the first prong of *Gant*'s test.

Additionally, defendant was arrested for the traffic offenses of driving with an expired registration tag and failing to notify the Division of Motor Vehicles of a change of address. Officer Yardley did not testify that he believed that the papers were related to the offenses charged. Furthermore, it would be unreasonable to presume that papers seen on the passenger seat of the car were related to an expired registration or a failure to report a change of address to the Department of Motor Vehicles. Accordingly, we hold that the search of defendant's vehicle cannot be justified under the evidentiary prong of *Gant*'s test.

Because defendant was not within reaching distance of the passenger compartment of his vehicle at the time of arrest, and because it was not reasonable for Officer Yardley to believe defendant's vehicle contained evidence of either offense of arrest, we hold, pur-

1. *Thornton v. United States*, 541 U.S. 615, 158 L. Ed. 2d 905 (2004).

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suant to *Gant*, that the search incident to arrest exception for warrantless searches and seizures does not apply here.

B. Plain View

[2] Since we formerly upheld the trial court's denial of defendant's motion to suppress based on the search incident to arrest exception, we declined to examine the applicability of the plain view exception to this case. We do so now.

One exception to the warrant requirement is the plain view doctrine, under which police may seize contraband or evidence if (1) the officer was in a place where he had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) it was immediately apparent to the police that the items observed were evidence of a crime or contraband.

State v. Graves, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999); see *State v. Mickey*, 347 N.C. 508, 516, 495 S.E.2d 669, 674, *cert. denied*, 525 U.S. 853, 142 L. Ed. 2d 106 (1998).

In *Graves*, a police officer interviewed the defendant, a shooting victim, in a hospital emergency room in order to gather information about the incident. *Id.* at 217-18, 519 S.E.2d at 771. During the interview, several wads of brown paper fell out of the defendant's clothing and onto the gurney. *Id.* at 218, 519 S.E.2d at 771. Without asking or telling the defendant, the officer proceeded to unravel the wads of paper. *Id.* He discovered a crack pipe, a brass screen, and crack cocaine. *Id.* The defendant was arrested the following morning after his release from the hospital. *Id.* at 218, 519 S.E.2d at 772. The defendant was charged with "one count of felonious possession of cocaine, one count of misdemeanor possession of drug paraphernalia, one count of resisting a public officer, and to being an habitual felon." *Id.* at 217, 519 S.E.2d at 771. Prior to pleading guilty, the defendant moved to suppress the evidence, claiming that the items seized were fruits of an unlawful search and did not fall within the plain view exception to the search warrant requirement. *Id.* at 218, 519 S.E.2d at 772. His motion was denied by the trial court. *Id.*

On appeal this Court agreed with the defendant and overturned the trial court's denial of the motion to suppress. *Id.* In so holding, we found that the State had successfully established the first two prongs of the plain view doctrine but had failed to satisfy the third prong of the test because "[t]he State . . . failed to establish that it was imme-

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diately apparent to the police officer that the items observed were evidence of a crime or contraband.” *Id.* at 219, 519 S.E.2d at 772. In clarifying the “immediately apparent” requirement, we held that “the State must establish that, given the facts and circumstances of the case, and viewed through the eyes of a policeman with the experience and training of [the officer], the nature of the contents of the brown paper wads was immediately apparent.” *Id.* at 219-20, 519 S.E.2d at 772-73. At the time the officer inadvertently discovered the paper wads, he was unable to discern whether the wads contained evidence of a crime or contraband. *Id.* at 220, 519 S.E.2d at 773. Only when the officer unraveled the papers was he able to determine what they contained. *Id.*

Here, Officer Yardley was clearly in a place where he had a right to be when he discovered the papers. He had approached defendant’s vehicle from the passenger side, in the interest of safety, to inquire about the old and worn temporary tag on defendant’s vehicle. He then inadvertently noticed several whole papers sitting in plain view on defendant’s passenger seat. At that point, Officer Yardley had decided to return to his cruiser to radio another officer for backup to execute an arrest. When Officer Yardley returned to defendant’s vehicle to arrest defendant, the previously intact papers on the passenger seat had been torn to pieces. It was at this point, when defendant made an obvious attempt to conceal the contents of the papers, that Officer Yardley became suspicious that the papers were evidence of criminal activity. Therefore, the first two prongs of the *Graves* test have been met in this case.

With regard to the third prong, the evidence in this case must be suppressed unless “it was immediately apparent to [Officer Yardley] that the items observed were evidence of a crime or contraband.” *Id.* at 219, 519 S.E.2d at 772. The evidence tended to show that Officer Yardley was unable to determine the contents of the torn papers until he pieced them together. As in *Graves*, the criminal nature of the evidence was not immediately apparent to the officer upon plain view examination. “Without testimony regarding the immediately apparent nature of the contraband, the evidence obtained from [the] search cannot be used at defendant’s trial.” *Id.* at 220, 519 S.E.2d at 773; *see also State v. Sanders*, 112 N.C. App. 477, 483, 435 S.E.2d 842, 846 (1993).

Officer Yardley testified: “I just remember speaking as I was on the passenger side there was a, pieces of papers on the passenger seat. I didn’t know what they were at the time, but they were com-

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plete, I guess. They were whole. They weren't torn, or ripped, or anything." He further testified:

While I was searching the vehicle[,] . . . I actually started placing the pieces of paper back together to see where they were torn up or what information may have been on it. And that's when I saw it was, it was a change of address form. And the name and the form was for Eric M. White, which obviously wasn't Mr. Carter. So, at that point I did ask about the piece of paper. He said 'it's just personal stuff.'

It is apparent from the officer's testimony that he did not immediately ascertain from plain view examination that the papers on defendant's front passenger seat constituted evidence of a crime or contraband. His suspicion that defendant was trying to conceal information on the papers was not sufficient to bypass the warrant requirement of the Fourth Amendment. "[T]he State cannot substitute speculation for evidence." *Id.* at 220, 519 S.E.2d at 773. Thus, the third prong of the plain view doctrine is not satisfied, and the contents of the papers cannot be admitted into evidence.

Conclusion

In sum, we reverse the trial court's denial of defendant's motion to suppress evidence. Neither the search incident to arrest exception nor the plain view exception to the search warrant requirement applies, and therefore the evidence in this case was unlawfully obtained. Accordingly, we vacate the judgment entered and remand this case to the trial court for further proceedings not inconsistent with this opinion.

Vacated and Remanded.

Judges ELMORE and STROUD concur.

ALBERT v. COWART

[200 N.C. App. 57 (2009)]

SHERY S. ALBERT, ADMINISTRATRIX OF THE ESTATE OF DORIS HILL KING;
SHERY S. ALBERT, ADMINISTRATRIX OF THE ESTATE OF FRANK LARUE
KING, PLAINTIFFS v. J. KIMZIE COWART, WACHOVIA CORPORATION, REGIONS
BANK, AM SOUTH INVESTMENT SERVICES, INC., AND NEW YORK LIFE IN-
SURANCE AND ANNUITY CORPORATION, DEFENDANTS

No. COA09-93

(Filed 15 September 2009)

**1. Appeal and Error— appealability—interlocutory order—
Rule 54(b) certification—no just reason for delay—judi-
cial economy**

Plaintiffs' motion to dismiss both appeals from interlocutory orders that were granted N.C.G.S. § 1A-1, Rule 54(b) certification by the trial court was denied because the issue of the survivorship interest was central to and determinative of the controversy between these parties and was a question of law.

**2. Banks and Banking— right of survivorship—intent—joint
checking account**

The trial court erred in a breach of fiduciary duty and negligence case by determining that a joint checking account did not incorporate a right of survivorship because the clear intent of Doris King's and Kimzie Cowart's Customer Access Agreements and the subsequent agreement between Doris King and Cowart to enter into a joint checking account was to incorporate a right of survivorship.

3. Negligence— cross-claim—derivative liability

The trial court did not err by granting summary judgment in favor of defendant Wachovia on the issue of defendant Cowart's cross-claim of negligence because review of the trial court's ruling on Wachovia's derivative liability is more properly presented after the underlying claims against Cowart are resolved.

Appeal by defendants from judgments entered 31 July 2008 and 2 September 2008 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 11 June 2009.

Prince, Youngblood & Massagee, PLLC, by Boyd B. Massagee, Jr., for plaintiff-appellee.

Dameron, Burgin, Parker & Jackson, P.A., by Phillip T. Jackson, for defendant-appellant J. Kimzie Cowart.

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William L. Gardo II for defendant-appellant J. Kimzie Cowart. K&L Gates LLP, by A. Lee Hogewood III, for defendant-appellant Wachovia Corporation.

Womble Carlyle Sandridge & Rice, by Tricia Morvan Derr, for defendant-appellee Regions Bank and AM South Investment Services, Inc.

Nelson Mullins Riley & Scarborough, LLC, by Thomas G. Hooper, for defendant-appellee New York Life Ins. and Annuity Corporation.

BRYANT, Judge.

Defendants Kimzie Cowart and Wachovia Corporation (Wachovia) appeal from Henderson County Superior Court judgments entered 31 July 2008 and 2 September 2008. For the reasons stated herein, we reverse in part the judgment of the trial court and dismiss in part the appeal.

Facts

Frank and Doris King were residents of Henderson County, North Carolina. At the age of 75, Doris was diagnosed with terminal cancer, and her doctor encouraged her to get her affairs in order. On 7 September 2005, Cowart, Frank King's nephew, received Doris's authorization for a durable power of attorney. On that same day, Cowart presented Wachovia with the document granting him durable power of attorney and authorizing him to conduct banking transactions on her behalf.

As long-time customers of Wachovia, the Kings had multiple accounts: on 8 September 2005, certificate of deposit number 51192050455143 (CD 143) had a balance of \$100,110.44; on 9 September 2005, certificate of deposit number 514112040471176 (CD 176) had a balance of \$54,950.45; on 9 September 2005, certificate of deposit number 514112050810824 (CD 824) had a balance of \$197,486.42; and on 9 September 2005, certificate of deposit number 514112050810832 (CD 832) had a balance of \$99,050.69. The Kings also maintained a joint checking account, number 1038892435650. Both Frank and Doris had individual Customer Access Agreements (CAA) on file with Wachovia authorizing that a right of survivorship be incorporated with any joint account opened with Wachovia. Each account was held jointly under the names of Frank and Doris King.

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On 8 September 2005, Cowart presented Wachovia with the following statement signed by himself and Doris King: “Please open a checking account in the names of Doris H. King and Kimzie Cowart in the amount of \$100,000.” On 9 September 2005, pursuant to the written request, Wachovia opened a joint checking account under the names Doris H. King and J. Kimzie Cowart—Account 588.

On 8 and 9 September 2005, as attorney-in-fact, Cowart liquidated the certificates of deposit held jointly by Frank and Doris King, withdrew \$9,000 from their joint checking account, and deposited a total of \$460,598.00 into Account 588. Doris King died 11 September 2005. Frank King died over a year later on 8 November 2006. Frank’s daughter and Doris’s stepdaughter, Sherry Albert, was appointed administratrix of their respective estates (plaintiffs).

On 11 September 2005, a check for \$5,519.80 was issued from Account 588. On 15 September 2005, a check was issued for \$450,000.00, made payable to AmSouth¹ from Account 588. On 12 October 2005, with a check issued by AmSouth, Cowart purchased a single premium deferred fixed annuity from New York Life Insurance and Annuity Corporation (New York Life) for \$400,000.00. Cowart is the owner and annuitant listed. On 12 October 2005, Wachovia Account 588 held a balance of \$5,105.03.

On 28 September 2006, plaintiffs filed suit against Cowart and Wachovia. On 5 September 2007, plaintiffs amended the complaint to add Regions Bank, AmSouth Investment Services, Inc. (AmSouth), and New York Life as additional defendants. In the complaint, plaintiffs alleged that Wachovia breached its fiduciary duty, acted negligently, and breached its debtor/creditor relationship; that Cowart breached his fiduciary duty, received unjust enrichment, and engaged in constructive fraud and conversion; and that Regions Bank, AmSouth, and New York Life were entitled to the imposition of a constructive trust on moneys transferred to them originating from Wachovia bank Account 588. Cowart filed an answer to the complaint and additionally, filed a cross-claim against Wachovia on the basis of derivative liability—if Cowart was liable to plaintiffs, he requested that Wachovia be taxed with the cost.

On 20 June 2008, Cowart filed a motion for partial summary judgment requesting that the trial court find that Account 588 was a joint account with right of survivorship and that all claims by plaintiff against Cowart be dismissed.

1. AmSouth, a banking institution, merged with Regions Bank 4 November 2006.

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As to Cowart, plaintiffs filed a motion for partial summary judgment requesting the following determinations:

1. that Wachovia bank [Account 588] was funded with monies belonging to Doris Hill King (“Doris”), and was not funded with any monies of Defendant Cowart;
2. that no name other than that of Doris and Defendant Cowart was purported to be on Account 588;
3. that Account 588 was not an account with right of survivorship;
4. that Doris died on September 11, 2005, and an amount in excess of \$450,000.00 was then in Account 588;
5. that \$450,000.00 was withdrawn from Account 588 by Defendant Cowart after September 11, 2005;
6. that upon the death of Doris, her estate was entitled to all monies in Account 588, including the \$50,000.00 withdrawn by Defendant Cowart; and
7. that Plaintiffs are entitled to a judgment against Defendant Cowart in the amount of \$450,000.00, with interest from September 16, 2005 until paid as a matter of law.

(Original emphasis).

On 31 July 2008, following a hearing on 7 July 2008, the trial court entered a judgment allowing Cowart’s motion as to plaintiffs’ claims of constructive fraud and conversion but denied his motion on plaintiffs’ claims of breach of fiduciary duty and unjust enrichment. The trial court also denied Cowart’s motion to determine that Account 588 included a right of survivorship and allowed plaintiffs’ motion to determine that Account 588 was not a survivorship account. The judgment was deemed final as to those claims and matters and pursuant to Rule 54(b) certified for immediate appeal. From this order, both Cowart and Wachovia appeal.

On 25 July 2008, Wachovia filed a motion for summary judgment requesting that the trial court find that Account 588 was a joint account with right of survivorship and enter an order dismissing both plaintiffs’ amended complaint and Cowart’s cross-claim against Wachovia.

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On 2 September 2008, following a hearing on 4 August 2008, the trial court entered an order granting summary judgment in favor of Wachovia on Cowart's cross-claim of negligence but, as with Cowart's motion, denied Wachovia's motion to determine that Account 588 was a survivorship account. The trial court also denied plaintiffs' motion on the issue of whether Wachovia acted in bad faith. This judgment was deemed final as to those claims and pursuant to Rule 54(b) certified for immediate appeal. From these orders, both Cowart and Wachovia appeal.

On appeal, Cowart and Wachovia individually question whether (I & III) the trial court erred in determining Account 588 to be a joint account without a right of survivorship. Wachovia separately contends that (II) plaintiffs' initial complaint alleging that Account 588 is a survivorship account precluded summary judgment; and Cowart contends that (IV) summary judgment of Cowart's cross-claim of negligence against Wachovia is precluded by the existence of a genuine issue of material fact.

[1] Before considering the arguments presented, we address plaintiffs' motion to dismiss both appeals as interlocutory.

Immediate appeal of interlocutory orders and judgments is available when a trial court enters a final judgment and certifies that there is no just reason for delay of the appeal as to one or more—but fewer than all—claims or parties and when an interlocutory order or judgment affects a substantial right. *See Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (citation omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2007) (“When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal . . .”). “Although not binding on this Court, we afford a trial court’s Rule 54(b) certification great deference on appeal.” *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 9, 652 S.E.2d 284, 291 (2007) (citation omitted).

Here, Cowart and Wachovia appeal from judgments entered 31 July 2008 and 2 September 2008. In the judgment entered 31 July 2008, the trial court denied Cowart's motion as to plaintiffs' claims of breach of fiduciary duty and unjust enrichment. However, the trial court allowed plaintiffs' motion to determine Account 588 did not

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have a right of survivorship. Pursuant to Rule 54(b), the trial court certified the judgment as final, stating, “[t]here is no just reason to delay the appeal of this Judgment.”

On 2 September 2008, the trial court entered a summary judgment order in favor of Wachovia on Cowart’s cross-claim of negligence but, as with Cowart’s motion, denied Wachovia’s motion to determine that Account 588 incorporated a survivorship right. This judgment was deemed final as to these claims and pursuant to Rule 54(b) certified for immediate appeal. From these orders, both Cowart and Wachovia appeal.²

Given the number of claims and counterclaims in this matter that are dependent upon the survivorship issue, we agree with the trial court’s determination that “[t]here is no just reason to delay the appeal of th[ese] Judgment[s].” *See Id.* at 9, 652 S.E.2d at 291. Further, as the issue of the survivorship interest is central and determinative to the controversy between these parties and limited to a question of law, judicial economy demands that we address this issue. *Robinson, Bradshaw & Hinson, P.A. v. Smith*, 139 N.C. App. 1, 9, 532 S.E.2d 815, 820 (2000) (“a trial judge by denominating his decree a ‘final judgment’ [cannot] make it immediately appealable under Rule 54(b) if it is not such a judgment However, we elect to review the instant appeal in the interests of judicial economy and pursuant to our discretionary powers.” (Internal citations omitted)).

Standard of Review

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion. The standard of review for summary judgment is de novo.

Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (internal citations and quotations omitted).

2. The trial court entered a second summary judgment order 2 September 2008 which denied Wachovia’s motion to dismiss the following claims set out by plaintiffs: breach of fiduciary duty, negligence, and breach of debtor/creditor relationship. Wachovia does not assign error or otherwise contest this order; therefore, the order is not within our scope of review. *See* N.C. R. App. P. 10(a) (2008).

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I & III

[2] First, Cowart and Wachovia individually assert that the trial court erred in determining that Account 588 did not incorporate a right of survivorship. We agree.

In interpreting contracts, we adhere to the following rules of construction:

[T]he goal of construction is to arrive at the intent of the parties when the [contract] was issued. Where a [contract] defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the [contract] are to be harmoniously construed, and if possible, every word and every provision is to be given effect.

Singleton v. Haywood Elec. Mbrshp. Corp., 357 N.C. 623, 629, 588 S.E.2d 871, 875 (2003). “A contract which contains no definite term as to its duration is terminable at will by either party upon reasonable notice after a reasonable time.” *Citrini v. Goodwin*, 68 N.C. App. 391, 397, 315 S.E.2d 354, 359 (1984).

Under North Carolina General Statutes, section 53-146.1, “[a]ny two or more persons may establish a deposit account or accounts by written contract. The deposit account and any balance thereof shall be held for them as joint tenants, with or without right of survivorship, as the contract shall provide” N.C. Gen. Stat. § 53-146.1(a) (2007). “Parties who wish to create a right of survivorship applicable to joint bank accounts must comply with the requirements of G.S. § 41-2.1(a)[.]” *In re Estate of Heffner*, 99 N.C. App. 327, 328, 392 S.E.2d 770, 771 (1990). Under General Statutes, section 41-2.1, a right of survivorship in banking deposits may be created by written agreement:

(a) A deposit account may be established with a banking institution in the names of two or more persons, payable to either or the survivor or survivors . . . when both or all parties have signed a written agreement, either on the signature card or by separate instrument, expressly providing for the right of survivorship.

N.C. Gen. Stat. § 41-2.1(a) (2007). “Funds in a joint account established with right of survivorship shall belong to the surviving joint tenant or tenants upon the death of a joint tenant . . . as provided in

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G.S. 41-2.1 if the account is established pursuant to the provisions of that section.” N.C.G.S. § 53-146.1(a) (2007).

Here, Doris King signed a Wachovia Customer Access Agreement (CAA) on 9 May 2003. At the outset, the CAA states “[t]his [CAA] (Signature Card) is designed to eliminate most subsequent signature cards and authorizations when opening future accounts.” The Wachovia CAA contained the following subsection:

RIGHT OF SURVIVORSHIP | ONLY N.C. ACCOUNTS:

I understand that by establishing a joint account under the provisions of: North Carolina General Statute 53-146.1 that:

1. Wachovia may pay the money in the account to, or on the order of, any person named in the account
2. Upon the death of one joint owner the money remaining in the account will belong to the surviving joint owners

I DO elect to create the Right of Survivorship for any joint account.

Doris King authorized this subsection by signing her name.

On 13 July 2000, Cowart signed a similar CAA with what is now also known as Wachovia.³ “This Agreement is designed to eliminate most subsequent signature cards and authorizations when opening future accounts.” The First Union CAA contained also the following subsection:

RIGHT OF SURVIVORSHIP (ONLY NC OR TN ACCOUNTS):

I understand that by establishing a joint account under the provision of:

North Carolina General Statute 53-146.1 that:

1. First Union may pay the money in the account to, or on the order of, any person named in the account
2. Upon the death of one joint owner the money remaining in the account will belong to the surviving joint owners

I DO elect to create the Right of Survivorship for any joint account.

Cowart authorized this section by his signature on the CAA.

3. Cowart signed a CAA with First Union 13 July 2000. Wachovia and First Union merged on about 2 September 2001, and Wachovia became the successor of First Union.

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On 7 September 2005, both Doris King and Cowart signed the following statement: “Please open a checking account in the name of Doris H. King and Kimzie Cowart in the amount of \$100,000.” On 8 September 2005, on the authority of the aforementioned statement and authorizations on file, Wachovia created Account 588 in the names of Doris H. King and Kimzie Cowart.

Notwithstanding arguments regarding the source of the funds deposited in Account 588 or statutory prohibitions against gifts under a power of attorney⁴, and instead focusing solely on the issue before us, whether Account 588 incorporated a right of survivorship, we acknowledge the clear intent of both Doris King and Cowart’s individual CAA forms specifically authorizing, pursuant to N.C. Gen. Stat. § 53-146.1, the incorporation of a right of survivorship to any joint account opened, as well as the subsequent agreement between Doris King and Cowart to enter into a joint checking account. On these facts, we hold that Account 588 incorporated a right of survivorship. Accordingly, the trial court’s determinations to the contrary in summary judgment orders entered 31 July 2008 and 2 September 2008 are reversed.

II

Next, Wachovia argues that plaintiffs’ initial complaint, which alleged that Account 588 incorporated a right of survivorship, supported Wachovia’s motion for summary judgment on the basis that a right of survivorship was created in connection with Account 588. For the reasons stated in issue *I supra*, we need not address this argument.

IV

[3] Last, Cowart argues that there exist genuine issues of material fact as to his cross-claim of negligence against Wachovia, and thus, it was error for the trial court to grant summary judgment in favor of Wachovia on that issue.

Wachovia argues that this issue is prematurely presented on appeal. As the cross-claim against Wachovia is derivative of Cowart’s liability, Wachovia can only be liable to Cowart if Cowart is deter-

4. *Laughter v. Shields*, 2002 N.C. App. LEXIS 2446 (COA01-1302) (N.C. Ct. App. Oct. 15, 2002) (unpublished) (Bryant, J. concurring) (“The defendant may not rely on her position as attorney-in-fact to decedent to withdraw the money [for her personal benefit], as it is clear that she would be in violation of N.C. Gen. Stat. § 32A-14.1(b) (2001).”).

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mined to be liable to plaintiffs. As this determination has yet to be made, review of the trial court's ruling on Wachovia's derivative liability is more properly presented after the underlying claims against Cowart are resolved. *See Cook v. Export Leaf Tobacco Co.*, 47 N.C. App. 187, 266 S.E.2d 754 (1980) (holding that despite the trial court's Rule 54(b) certification, dismissal of the appeal was appropriate where the partial summary judgment order appealed from ordered a third-party defendant to indemnify a defendant for the plaintiff's claims prior to a determination that the defendant was liable). We agree. Accordingly, this issue is dismissed.

REVERSED IN PART; DISMISSED IN PART.

Judges CALABRIA and ELMORE concur.

HOUSECALLS HOME HEALTH CARE, INC., HOUSECALLS HEALTHCARE GROUP, INC., AND TERRY WARD, INDIVIDUALLY, PLAINTIFFS v. STATE OF NORTH CAROLINA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND DEMPSEY BENTON, INDIVIDUALLY AND AS SECRETARY, DEFENDANTS

No. COA08-1322

(Filed 15 September 2009)

1. Statutes of Limitation and Repose— contract and tort claims—Medicaid payments withheld

The trial court correctly granted summary judgment for the State based on the statute of limitations on contract and tort claims arising from the withholding of payments from the State to plaintiff for medical care given to Medicaid patients.

2. Statutes of Limitation and Repose— § 1983 accrual—federal question

The question of when a 42 U.S.C. § 1983 claim accrues is a question of federal law.

3. Civil Rights— § 1983—Medicaid payments withheld— statute of limitations—accrual of claim

Summary judgment for defendant based on the statute of limitations on a 42 U.S.C. § 1983 claim arising from Medicaid payments claims was reversed. There was a genuine issue of ma-

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terial fact as to when plaintiffs knew or reasonably should have known that the investigation into the Medicaid payments was closed.

Judge GEER concurring.

Appeal by plaintiffs from order entered 30 June 2008 by Judge A. Leon Stanback, Jr. in Wake County Superior Court. Heard in the Court of Appeals 9 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Richard J. Votta, for the State.

Thomas B. Kobrin for plaintiff-appellants.

BRYANT, Judge.

Plaintiffs Housecalls Home Health Care, Inc. (Housecalls), Housecalls Healthcare Group, Inc., and Terry Ward appeal from an order entered 30 June 2008 which granted defendants' motion for summary judgment and dismissed with prejudice each of plaintiffs' causes of action. For the reasons stated herein, we affirm in part, reverse in part and remand the order of the trial court.

Plaintiffs Housecalls and Housecalls Healthcare Group, Inc. are North Carolina corporations with a principal place of business in Greensboro, North Carolina. Both corporations are owned by plaintiff Terry Ward.

Housecalls entered into a participation agreement with defendant North Carolina Department of Health and Human Services (NCDHHS) in which NCDHHS was to pay Housecalls for medical care rendered to Medicaid patients. In a letter dated 7 April 1997, the Program Integrity Section of the Division of Medical Assistance of NCDHHS notified Housecalls that it was withholding Medicaid payments pursuant to 42 C.F.R. § 455.23¹, entitled "[w]ithholding of payments in cases of fraud or willful misrepresentation."

1. 42 C.F.R. § 455.23—Withholding of payments in cases of fraud or willful misrepresentation. (a) Basis for withholding. The State Medicaid agency may withhold Medicaid payments, in whole or in part, to a provider upon receipt of reliable evidence that the circumstances giving rise to the need for a withholding of payments involve fraud or willful misrepresentation under the Medicaid program. The State Medicaid agency may withhold payments without first notifying the provider of its intention to withhold such payments. A provider may request, and must be granted, administrative review where State law so requires.

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The Medicaid Investigation Unit of the North Carolina Attorney General's Office (NCAGO) conducted an investigation of Home Health Care, Inc., which was forwarded on to the United States Attorney's office for review. In addition, the NCDHHS conducted its own investigation. As a result of the investigation, and pursuant to state and federal regulations, payments for Medicaid services provided by Housecalls were withheld. Equipment and records of Housecalls were seized pursuant to search warrants obtained by NCAGO.

Housecalls filed an action in OAH—the Office of Administrative Hearings—to contest the withholding of Medicaid payments. A temporary restraining order was entered in an attempt to enjoin NCDHHS from withholding medicaid payments; however, on 13 July 1998, after Housecalls filed a motion to show cause why NCDHHS should not be held in contempt for failure to obey the restraining order, a Randolph County Superior Court judge determined that the administrative order had expired by its own terms and that, moreover, the respondent State agency was not subject to contempt proceedings. The suit filed by Housecalls in OAH was later dismissed for failure to prosecute and upon request by plaintiff, for having exhausted its administrative remedies.

In a letter dated 13 January 2004, Christopher Brewer, then Director of the Medicaid Investigations Unit of the NCAGO, received an inquiry from Housecalls about the status of the investigation and the funds. Brewer responded by letter dated 3 February 2004 and addressed to plaintiffs' legal counsel, J. Sam Johnson, Jr., which stated that the investigation had been closed and the withheld funds disbursed to federal, state, and county resources in partial recoupment of the overpayments found during the investigation.

On 17 August 2006, plaintiffs filed a civil action against defendants in the United States District Court for the Middle District of North Carolina. Plaintiffs brought causes of action for breach of contract, violation of the United States Constitution, and violation of the North Carolina Constitution, violation of 42 U.S.C. § 1983; sought declaratory relief to clarify the parties' legal rights; and sought injunctive relief to obtain the release of withheld payments and other related compensatory damages. Federal Magistrate Judge Russell A. Eliason recommended that plaintiffs' claims be dismissed with the exception of claims (1) seeking prospective declaratory relief concerning whether 42 C.F.R. § 455.23 requires a continuing active inves-

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tigation or the filing of legal proceedings in order to justify the continued withholding of funds and whether there is such an investigation concerning Housecalls, and (2) seeking an injunction ordering the return of seized property. On 23 July 2007, the United States District Court entered an order consistent with the magistrate judge's recommendation.

On 28 September 2007, plaintiffs filed suit against defendants alleging breach of contract, violation of the United States Constitution, violation of the North Carolina Constitution, entitlement to legal and injunctive relief pursuant to 42 U.S.C. § 1983, conversion, and unjust enrichment. Defendants answered and on 12 June 2008 filed a motion for summary judgment asserting plaintiffs' claims were barred by the three-year statute of limitations contained in N.C. Gen. Stat. § 1-52 and all other applicable limitations periods and laches. On 5 November 2007, plaintiffs filed an affidavit by former legal counsel, J. Sam Johnson, Jr., in which Johnson avers that he did not receive a letter from Christopher Brewer about the status of the investigation and the funds. On 30 June 2008, a Wake County Superior Court judge determined that plaintiffs' claims were barred by applicable statutes of limitations and ordered that defendants' motion for summary judgment be granted and that each of the plaintiffs' causes of action be dismissed with prejudice. Plaintiffs appeal.

On appeal, plaintiffs raise the following question: Did the trial court commit reversible error in granting defendants' motion for summary judgment on the basis of a violation of the statute of limitations.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 (c) (2007). "Further, the evidence presented by the parties must be viewed in the light most favorable to the non-movant. Where a claim is barred by the running of the applicable statute of limitations, summary judgment is appropriate." *Webb v. Hardy*, 182 N.C. App. 324, 326, 641 S.E.2d 754, 756, *disc. review denied*, 361 N.C. 704, 653 S.E.2d 879 (2007) (internal citations omitted). On appeal, the standard of review for summary judgment is de novo. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

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Discussion

[1] Plaintiffs argue the trial court committed reversible error in granting defendants' motion for summary judgment because there exist genuine issues of material fact as to whether their claims are barred by the statute of limitations. Specifically, plaintiffs contend that the statute of limitations to recover wrongly forfeited assets is six years and that in this case the statute of limitations began to run when defendants answered plaintiffs' complaint and notified plaintiffs that the withheld Medicaid payments had been forfeited. We agree in part.

Although plaintiffs contend that a six-year statute of limitations should apply, they rely solely on *United States v. Minor*, 228 F.3d 352 (4th Cir. 2000). In *Minor*, the Fourth Circuit held that 28 U.S.C. § 2401(a)'s six-year statute of limitations applied with respect to Minor's claim for wrongful forfeiture of currency by the United States government. *Id.* at 359-60. "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401 (2007). Since this lawsuit does not involve claims against the United States government, plaintiffs have no basis for contending that 28 U.S.C. § 2401 and *Minor* apply.

Under our General Statutes, the statute of limitations for bringing a cause of action for breach of contract, conversion, or unjust enrichment is three years. N.C. Gen. Stat. § 1-52(1), (4) (2007); *see Dean v. Mattox*, 250 N.C. 246, 251, 108 S.E.2d 541, 546 (1959) ("an action to recover for money had and received, under the doctrine of unjust enrichment, is an action on implied contract"). Further, the three year statute of limitations as set forth in N.C.G.S. § 1-52 applies to due process actions brought in the North Carolina court system under 42 U.S.C. § 1983. *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 367, 424 S.E.2d 420, 424, *affirmed*, 335 N.C. 158, 436 S.E.2d 821 (1993).

For state contract and tort claims, "the period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed." *Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 478, 617 S.E.2d 61, 63 (2005) (internal quotation marks and citation omitted), *affirmed*, 361 N.C. 137, 638 S.E.2d 197 (2006). "Once the statute [of limitations] is pleaded, the

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burden is on the plaintiff to show that the action was brought within the applicable period.” *Silver v. N.C. Bd. of Transp.*, 47 N.C. App. 261, 266, 267 S.E.2d 49, 54 (1980) (citation omitted).

Here, in a letter dated 7 April 1997, the Program Integrity Section of the Division of Medical Assistance notified Housecalls that it was withholding Medicaid payments pursuant to 42 C.F.R. § 455.23:

[42 C.F.R.] § 455.23 Withholding of payments in cases of fraud or willful misrepresentation.

(a) Basis for withholding. The State Medicaid agency may withhold Medicaid payments, in whole or in part, to a provider upon receipt of reliable evidence that the circumstances giving rise to the need for a withholding of payments involve fraud or willful misrepresentation under the Medicaid program.

. . .

(c) Duration of withholding. All withholding of payment actions under this section will be temporary and will not continue after:

(1) The agency or the prosecuting authorities determine that there is insufficient evidence of fraud or willful misrepresentation by the provider; or

(2) Legal proceedings related to the provider’s alleged fraud or willful misrepresentation are completed.

42 C.F.R. § 455.23 (2007).

While the record before this Court provides no exact date as to when the investigation of plaintiffs was complete, it is clear that, in response to plaintiffs’ 13 January 2004 inquiry into the status of the investigation, a letter dated 3 February 2004 was sent to plaintiffs’ counsel stating the investigation had been closed and the withheld funds disbursed to federal, state, and county resources in partial recoupment of the overpayments found during the investigation. Plaintiffs filed their complaint 23 September 2007, more than three years after the February 2004 communication. Thus, the state contract and tort claims were filed outside the statute of limitations and we affirm that portion of the trial court’s order granting summary judgment in favor of defendants on those claims.

[2] We next consider plaintiffs’ § 1983 claim. We note that our courts have not previously addressed whether state or federal law applies to

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a determination of when a § 1983 cause of action accrues; however, the United States Court of Appeals for the Fourth Circuit has held that the determination of when a § 1983 cause of action accrues is a question of federal law.

The selection of the appropriate statutory limitations period is only the first step in the analysis. There remains the question of when [the plaintiff]'s cause of action accrued. While the statutory limitations period for § 1983 actions is borrowed from state law, the time of accrual of a civil rights action is a question of federal law. Federal law holds that the time of accrual is when [the] plaintiff knows or has reason to know of the injury which is the basis of the action.

Nat'l Adver. Co. v. Raleigh, 947 F.2d 1158, 1162 (4th Cir. 1991) (internal citations, quotations, and brackets omitted); *see also Bd. of Regents v. Tomanio*, 446 U.S. 478, 484, 64 L. Ed. 2d 440, 447-48 (1980) (since Congress did not establish a statute of limitations or a body of tolling rules applicable to federal court actions brought under the Civil Rights Act of 1871, the analogous state statute of limitations and the coordinate tolling rules are binding rules of law in most cases; this "borrowing" of the state's statute of limitations includes rules of tolling unless they are "inconsistent" with federal law.). While we are not bound by decisions of the Fourth Circuit, we find the reasoning in *National Advertising* persuasive and believe the issue of when a § 1983 cause of action accrues is a question of federal law.

[3] In applying the federal rule that a cause of action accrues "when [a] plaintiff knows or has reason to know of the injury which is the basis of the action[.]" *Nat'l Adver. Co. v. Raleigh*, 947 F.2d at 1162, plaintiffs' cause of action accrued at the time they knew or had reason to know that the investigation had been closed and the withheld funds disbursed.

As previously discussed, plaintiffs filed their claim more than three years after the February 2004 communication. However, plaintiffs filed an affidavit stating in essence that they did not receive a letter regarding the status of the investigation and the funds. On these facts, we hold there exists a genuine issue of material fact as to when plaintiffs knew or reasonably should have known that the investigation was closed. Therefore, because factual questions exist as to when plaintiffs' § 1983 cause of action accrued, we reverse the trial court's order of summary judgment as relates to the § 1983 claim.

HOUSECALLS HOME HEALTH CARE, INC. v. STATE

[200 N.C. App. 66 (2009)]

AFFIRMED IN PART; REVERSED IN PART and REMANDED.

Judge STEPHENS concurs.

Judge GEER concurs in a separate opinion.

GEER, Judge, concurring.

I concur fully in the majority opinion. I write separately simply to make some additional points with respect to the application of the pertinent statutes of limitation to plaintiffs' claims. These observations provide additional support for the conclusions reached by the majority opinion.

With respect to the state law claims, plaintiffs assert that they "did not have reasonable knowledge that the funds and assets had been formally forfeited until September 5, 2007." Although this argument presumes that a discovery rule applies, plaintiffs cite no authority in support of this assumption. The only statutory provision that could arguably apply is the "discovery rule" set out in N.C. Gen. Stat. § 1-52(16) (2007). That provision, however, only governs causes of action "for personal injury or physical damage to claimant's property." *Id.* Since plaintiffs' claims involve only pecuniary losses or the failure to return property, N.C. Gen. Stat. § 1-52(16) cannot apply. *See White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 310, 603 S.E.2d 147, 165 (2004) (holding that N.C. Gen. Stat. § 1-52(16) did not apply with respect to claim that defendant converted plaintiff's funds because he did not physically damage plaintiff's property), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). Consequently, the date that plaintiffs obtained knowledge that the funds and assets had been forfeited is immaterial.

With respect to plaintiffs' § 1983 claim, we cannot disregard plaintiffs' federal action filed on 17 August 2006. The federal complaint was essentially identical to this action, but added a claim for declaratory relief. Although on 23 July 2007, the federal court dismissed on various grounds almost all of plaintiffs' claims, the court denied defendants' motion to dismiss plaintiffs' § 1983 claim "seeking an injunction ordering the return of seized property." As a result, plaintiffs' § 1983 claim for an injunction requiring the return of the property that defendants had seized remained pending in federal court at the time plaintiffs filed this action, asserting an identical claim under § 1983 that seeks, in part, the return of the seized property.

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Defendants have not argued that the § 1983 claim filed in federal court was untimely. This Court has held that “filing an action in federal court which is based on state substantive law does toll the statute of limitations while that action is pending.” *Clark v. Velsicol Chem. Corp.*, 110 N.C. App. 803, 808, 431 S.E.2d 227, 229 (1993), *aff’d per curiam*, 336 N.C. 599, 444 S.E.2d 223 (1994). The reasoning in *Clark* should apply equally to a federal cause of action filed in federal court. Accordingly, the statute of limitations on plaintiffs’ § 1983 action for injunctive relief regarding the seized property was tolled by the filing of the federal action. Because that action was still pending as to that claim at the time the state action was filed, plaintiffs’ § 1983 claim for injunctive relief cannot be barred by the statute of limitations, at least based on the current record. I would for that additional reason reverse the trial court’s order granting summary judgment as to plaintiffs’ § 1983 claim.

STATE OF NORTH CAROLINA v. SHANNON DON HORTON

No. COA09-7

(Filed 15 September 2009)

1. Evidence— testimony of counselor—credibility of victim

There was prejudicial error in an indecent liberties prosecution where an expert in the treatment of abused children, who was also the victim’s counselor, testified that the credibility of children is enhanced when they provide details such as those provided by this victim.

2. Evidence— testimony of counselor—opinion that victim abused

There was prejudicial error in an indecent liberties prosecution where the victim’s counselor testified that the victim had more likely than not been sexually abused. This exceeds the permissible opinion testimony that a child exhibits characteristics consistent with abused children.

3. Evidence— testimony of counselor—substantially corroborative

There was no prejudicial error in an indecent liberties prosecution in the admission of hearsay testimony from the victim’s

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counselor. That testimony provided new information, but tended to strengthen the child's testimony. Substantially corroborative testimony is not rendered incompetent by the fact that there is some variation.

4. Appeal and Error— records and briefs—protecting identity of juveniles

Appellate records and briefs are public records and the State and all defendants are cautioned to guard juveniles' identities by not referring to juveniles or those related to them by name.

Appeal by Defendant from judgments entered 20 March 2008 by Judge Robert P. Johnston in Superior Court, Burke County. Heard in the Court of Appeals 10 June 2009.

Attorney General Roy Cooper, by Assistant Attorney General Jane Rankin Thompson, for the State.

Duncan B. McCormick for Defendant-Appellant.

McGEE, Judge.

Shannon Don Horton (Defendant) was indicted on two counts of taking indecent liberties with a child on 5 July 2005. Defendant was also indicted on two counts of first-degree rape on 13 February 2006. Defendant was found guilty by a jury of two counts of taking indecent liberties with a child and one count of first-degree rape on 20 March 2008. The trial court sentenced Defendant to 240 to 297 months in prison for one count of first-degree rape and a consecutive sentence of seventeen to twenty-one months for one count of taking indecent liberties with a child. The trial court imposed a suspended sentence of seventeen to twenty-one months for the second count of taking indecent liberties with a child. Defendant appeals.

The State's evidence at trial tended to show the following: The alleged child victim (the child) knew Defendant through her father. Defendant was not married at the time the alleged abuse occurred, but was married to Chastity Horton (Chastity) at the time of trial.

In July 2004, the child, then twelve years old, and her female cousin (the cousin), then sixteen years old, spent the night at a trailer (the trailer) that Defendant and Chastity were renting. During a cook-out earlier that day, Defendant had given the child vodka. That evening, the child and the cousin slept on two couches in the trailer's living room. Defendant woke the child up in the middle of the night,

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forced her to touch his penis with her hand, and had sexual intercourse with her. Defendant told the child not to tell anyone what had happened because both of them would get in trouble.

The following morning, the child and Defendant stayed at the trailer while Chastity and the cousin left to get breakfast. Defendant again forced the child to touch his penis with her hand and Defendant twice put his tongue in the child's vagina. Defendant ceased these acts when Chastity and the cousin returned to the trailer. A week or two later, the child again spent the night at the trailer and Defendant again put his tongue in the child's vagina and tried to put his penis in her mouth. When the child refused, Defendant ejaculated on her chest.

Initially, the child did not tell anyone what had occurred with Defendant. About a month after the incidents, the child told her older sister (the sister) about the sexual abuse, and made the sister promise not to tell their mother. Sometime later, their mother overheard the child and the sister arguing and heard the child state: "It's not like I can keep a twenty-four-year-old off of me." The child's mother asked her what had happened, and the child eventually told her mother what Defendant had done to her.

Her mother took the child to the Sheriff's Office and to the Burke County Child Advocacy Center, also known as Gingerbread House, on 6 October 2004. At Gingerbread House, the child was interviewed and given a physical examination by Elizabeth Browning, a sexual assault nurse examiner. Ms. Browning testified that the child had no physical abnormalities in her physical exam. Dr. John Betancourt, a board-certified child sexual abuse examiner, testified that he physically examined the child in October 2004. He testified that the child's exam showed no physical evidence of abuse, but that he could not rule out that she had had sexual intercourse in July 2004. Adrienne Opdyke, a victim's advocate, also interviewed the child at Gingerbread House in October 2004. Ms. Opdyke testified that she referred the child to Ashley Fiore (Ms. Fiore), a licensed clinical social worker, for counseling.

The child began seeing Ms. Fiore in October 2004 and continued seeing her until September 2005. Over time during the child's treatment with Ms. Fiore, the child provided additional details of her abuse by Defendant, and her conflicting feelings towards Defendant. The child's mother told Ms. Fiore that the child had been depressed, angry, and withdrawn since the alleged incidents with Defendant. At

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trial, Ms. Fiore testified as an expert in the treatment of sexually abused children.

Defendant presented the testimony of his sister, Misty Christopher. Ms. Christopher testified that she did not see Defendant give the child alcohol at the cookout. She also testified that the child seemed happy on the morning after the first alleged sexual assault.

Defendant testified he did not provide the child with alcohol. Defendant further stated that on the night of the first alleged assault he went to bed before anyone else and did not get up until the next morning. Defendant testified that, when the child spent the night at the trailer a few weeks later, he did not see her after he went to bed. Defendant also testified that while Chastity and the cousin were out getting breakfast the next morning, he was feeding his infant daughter. Defendant testified that he never inappropriately touched the child.

I.

[1] Defendant contends in his first argument that the trial court committed prejudicial error by admitting testimony from Ms. Fiore that the credibility of alleged victims of child abuse is enhanced when they provide specific details about the alleged abuse. We agree.

Our Supreme Court has held:

“A trial court’s ruling on an evidentiary point will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect. Even if the complaining party can show that the trial court erred in its ruling, relief ordinarily will not be granted absent a showing of prejudice.”

State v. Cheek, 351 N.C. 48, 68, 520 S.E.2d 545, 557 (1999) (quoting *State v. Mickey*, 347 N.C. 508, 520, 495 S.E.2d 669, 676 (1998) (internal citations omitted)). Our Court must determine whether admitting Ms. Fiore’s credibility testimony constituted error, and if so, whether the error was prejudicial.

“Our appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence.” *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988) (citations omitted). Further, when a case involves alleged sexual misconduct against a child victim and there is no physical evidence, “the trial court should not admit expert opinion that sexual abuse has *in fact* occurred

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because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (citations omitted). "[W]hile it is impermissible for an expert, in the absence of physical evidence, to testify that a child has been sexually abused, it is permissible for an expert to testify that a child exhibits 'characteristics [consistent with] abused children.' " *State v. Grover*, 142 N.C. App. 411, 419, 543 S.E.2d 179, 184 (2001) (quoting *State v. Aguillo*, 322 N.C. 818, 821, 370 S.E.2d 676, 677 (1988)).

In the present case, Ms. Fiore testified as a witness with expertise in the treatment of sexually abused children. Ms. Fiore testified that, over the course of counseling, the child described details of the alleged sexual abuse, including a moment when Defendant's knee was hurting the child's hip. Defendant allegedly said he was "[s]orry" when he noticed he was hurting the child. At trial, the prosecutor asked Ms. Fiore: "As far as treatment for victims, for counseling victims, why would that detail be significant? " After the trial court overruled defense counsel's objection to this question, Ms. Fiore responded: "In all of my training and experience, when children provide those types of specific details it enhances their credibility." Defense counsel objected to Ms. Fiore's answer and moved to strike it from the record, but Defendant's objection and motion to strike were both overruled. Because there was no physical evidence presented at trial, Ms. Fiore's statement was "an impermissible opinion regarding the victim's credibility." *Stancil*, 355 N.C. at 266-67, 559 S.E.2d at 789.

An error, not involving a constitutional violation, is prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2007). It is Defendant's burden to prove prejudice. *Id.*

The State's evidence consisted of testimony from the child, her family members, and various experts. All of the State's evidence relied in whole or in part on the child's statements concerning the alleged sexual abuse. There was no physical evidence presented that bolstered the State's case that the child was sexually abused, or that Defendant was the perpetrator of any such abuse. There was no testimony presented by the State that did not have as its origin the accusations of the child. For this reason, the credibility of the child was central to the State's case.

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Defendant's evidence consisted of his testimony that he did not sexually abuse the child and that his contact with her was minimal. Defendant's sister also testified that Defendant never gave the child alcohol and that the child seemed happy the morning after the alleged first instance of abuse. The child admitted that she chose to remain in the house with Defendant the morning following the first alleged sexual assault and that she voluntarily returned to Defendant's house on two more occasions after that time. Further, the child's account of what happened evolved over time, and new allegations of what happened to her came out gradually during her therapy with Ms. Fiore.

We realize it may be common for victims of sexual abuse, and for children in particular, to provide additional details over time to a therapist concerning painful events as rapport and trust develops. However, it is the province of the jury, not this Court, to make credibility determinations based upon the evidence presented at trial. *State v. Legins*, 184 N.C. App. 156, 159, 645 S.E.2d 835, 837 (2007) (citation omitted). Except for Ms. Fiore's testimony, the evidence presented at trial amounted to conflicting accounts from the child, Defendant, and their families.

Because Ms. Fiore was an expert in treating sexually abused children, her opinion could have held significant weight with the jury. Considering Ms. Fiore's testimony in light of the other evidence, there is a reasonable possibility that the testimony in question influenced the jury's verdict by enhancing the credibility of the child in the jurors' minds. We hold that admission of Ms. Fiore's testimony concerning the child's credibility constituted prejudicial error, and thus Defendant is entitled to a new trial.

II.

[2] We address Defendant's remaining arguments because these issues might reoccur at Defendant's new trial.

In Defendant's second argument, he contends the trial court committed prejudicial error by admitting Ms. Fiore's testimony that the child "had more likely than not been sexually abused where the opinion was not supported by any physical evidence". We agree.

As noted above, "it is permissible for an expert to testify that a child exhibits 'characteristics [consistent with] abused children.' " *Grover*, 142 N.C. App. at 419, 543 S.E.2d at 184 (quoting *State v. Aguallo*, 322 N.C. 818, 821, 370 S.E.2d 676, 677 (1988)). In the present case, defense counsel asked Ms. Fiore, "as you just admitted earlier,

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maybe [the child] just didn't want to participate in this type of counseling, because maybe she wasn't abused' " As Ms. Fiore began to answer "I would not have taken her as a client or as[,]" defense counsel objected, but Ms. Fiore finished her answer, saying she would not have taken the child as a client "[o]r have used this treatment model with her unless she had met the criteria, which [included] that . . . she had more likely than not been sexually abused and that had been found[.]" Ms. Fiore's statement that the child had "more likely than not been sexually abused" exceeds permissible expert opinion testimony that a child "exhibits 'characteristics [consistent with] abused children.'" *Grover*, 142 N.C. App. at 419, 543 S.E.2d at 184. We hold that allowing expert testimony stating the child had "more likely than not been sexually abused" was error.

III.

[3] In Defendant's third argument, he contends the trial court committed prejudicial error by admitting hearsay testimony from Ms. Fiore about Defendant "grooming" the child. We disagree.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2007). "A prior consistent statement may be admissible as non-hearsay even when it contains new or additional information when such information tends to strengthen or add credibility to the testimony which it corroborates." *State v. Levan*, 326 N.C. 155, 167, 388 S.E.2d 429, 435 (1990) (citations omitted).

Ms. Fiore's testimony consisted of descriptions of "grooming" techniques commonly used by perpetrators of sexual abuse to increase the likelihood of success. Ms. Fiore testified such techniques include tickling, making excuses to touch the child's body, and doing things to make it seem like the perpetrator accidentally touched the child's private parts. Ms. Fiore testified that, after she began educating the child about these different aspects of "grooming," the child volunteered additional information. Ms. Fiore's testimony included statements the child made to Ms. Fiore that the child did not testify to at trial. For example, Ms. Fiore testified that the child stated Defendant tickled her, gave her cigarettes, treated her like a girlfriend, made her feel special, allowed her to drive his car, and that the child had a crush on Defendant. Defendant objected to these statements of Ms. Fiore, arguing they did not corroborate the testimony of the child.

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“ ‘[W]here testimony which is offered to corroborate the testimony of another witness does so substantially, it is not rendered incompetent by the fact that there is some variation.’ ” *State v. Loyd*, 354 N.C. 76, 104, 552 S.E.2d 596, 617 (2001) (quoting *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980)). Although Ms. Fiore’s testimony provided “new or additional information[,]” her testimony tended to “strengthen” the child’s testimony that she had been sexually abused by Defendant, as it tended to support the proposition that Defendant had “groomed” the child to facilitate his alleged sexual abuse of the child. *Id.* We hold that it was not error to admit Ms. Fiore’s “grooming” testimony. This argument is without merit.

IV.

[4] In his final argument, Defendant contends that the trial court erred in denying his motion for a mistrial. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1061:

Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant’s motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant’s case.

N.C. Gen. Stat. § 15A-1061 (2007). Further, “a trial court’s decision concerning a motion for mistrial will not be disturbed on appeal unless there is a clear showing that the trial court abused its discretion.” *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991) (citation omitted).

At the end of Defendant’s testimony, Defendant’s attorney asked the Defendant:

[DEFENSE COUNSEL]: Have you ever at any point and time wavered even a little bit in asserting to anyone that would listen to you that you are innocent of these charges?

A: I am innocent.

During re-cross examination, the prosecutor asked Defendant:

[STATE]: Did you assert to law enforcement that you’re innocent?

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Sustained.

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Defendant's attorney then asked Defendant on re-direct:

[DEFENSE COUNSEL]: You never told law enforcement that you weren't innocent and you told them that you were absolutely innocent, didn't you?

[DEFENDANT]: Yes, sir.

At the close of all the evidence, Defendant moved for a mistrial as a result of the State's question as to whether Defendant asserted his innocence to law enforcement. The trial court denied Defendant's motion.

We cannot hold, on these facts, that the trial court abused its discretion in denying Defendant's motion for a mistrial based wholly upon the State's question, when the trial court sustained Defendant's objection to that question, and Defendant testified that he had always maintained to law enforcement that he was innocent of the crimes charged. *Id.* Further, this issue *should not* reoccur at the new trial, as we trust the State will not again impermissibly reference any subject that could imply guilt based upon Defendant's constitutional right to remain silent, whether Defendant chooses to exercise that right or not.

V.

As a final note, we emphasize that appellate briefs and records are public records. It is the policy of this State to avoid unnecessary embarrassment, persecution, notoriety or other hardship to juveniles by scrupulously guarding their identities. For this reason, we do not refer to juveniles by name, and make every reasonable attempt to guard juveniles' identities by not using real names for others related to them. For obvious reasons, adult defendants are referred to by name, even when they are accused of the abuse of juveniles. We caution the State and all defendants to ensure the same care is given in the briefs and records submitted to this Court.

New trial.

Judges JACKSON and ERVIN concur.

BIGGERS v. BALD HEAD ISLAND

[200 N.C. App. 83 (2009)]

HOWARD BIGGERS III, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF HOWARD BIGGERS, IV, DECEASED, AND CINDY BIGGERS, PLAINTIFFS v. BALD HEAD ISLAND, A NORTH CAROLINA MUNICIPALITY; BALD HEAD ISLAND LIMITED, A FOREIGN LIMITED PARTNERSHIP; BALD HEAD ISLAND MANAGEMENT, INC.; MITCHELL ISLAND INVESTMENTS, INC., A FOREIGN CORPORATION, AS GENERAL PARTNER OF BALD HEAD ISLAND LIMITED; AND, DOUGLAS “BUD” ODELL, DEFENDANTS

BALD HEAD ISLAND LIMITED, DEFENDANT, THIRD-PARTY PLAINTIFFS v. TIMOTHY MATTHEWS, THIRD-PARTY DEFENDANT

No. COA08-249

(Filed 15 September 2009)

1. Immunity—governmental immunity—discretionary powers

The trial court did not err in a negligence case by granting summary judgment in favor of defendant Village because: (1) a municipal corporation is not liable in an action for damages either for the non-exercise of, or for the manner in which, in good faith, it exercises discretionary powers of a public or legislative character; and (2) the Village’s failure to adopt an ordinance requiring the installation of seatbelts on golf carts was beyond the purview of our courts.

2. Negligence—duty of care—renting golf cart without seatbelt—hidden danger

The trial court did not err in a negligence case by granting summary judgment in favor of defendants Limited and Odell because defendants did not breach a duty of care by renting a golf cart without a seatbelt to plaintiffs or by failing to provide warning of the purported hidden danger of falling out of a golf cart.

Appeal by plaintiffs from orders entered 10 September 2007, 11 September 2007 and 17 September 2007 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 24 September 2008.

Jones Martin Parris & Tessener Law Offices, P.L.L.C., by H. Forest Horne, Jr. and Kristen L. Beightol, for plaintiffs-appellants.

Patterson Dilthey, LLP, by Ronald C. Dilthey, for Bald Head Island Limited, defendants-appellees.

Crossley McIntosh Collier Hanley & Edes, P.L.L.C., by Brian E. Edes, for Village of Bald Head Island, defendants-appellees.

BIGGERS v. BALD HEAD ISLAND

[200 N.C. App. 83 (2009)]

*Brown, Crump, Vanore & Tierney, L.L.P., by Derek M. Crump,
for Douglas “Bud” Odell, defendants-appellees.*

JACKSON, Judge.

Howard Biggers, III (“Mr. Biggers”) and Cindy Biggers (“Mrs. Biggers”) (collectively, “plaintiffs”) parents of Howard Biggers, IV (“Howard”) and Garrett Biggers (“Garrett”) appeal the trial court’s orders granting summary judgment in favor of the Village of Bald Head Island (“the Village”), Bald Head Island Limited (“Limited”), and Douglas “Bud” Odell (“Odell”) (collectively, “defendants”). For the reasons discussed herein, we affirm the trial court’s orders.

Early in 2003, plaintiffs planned a family vacation to the Village for the upcoming summer. Plaintiffs previously had vacationed in the Village in 1997, 1999, 2000, 2001, and 2002. On 17 March 2003, plaintiffs entered into a Guest Rental Agreement with Limited to rent a cottage and electric vehicle¹ owned by Odell for their vacation.²

On 28 June 2003, plaintiffs traveled to the Village with their two children, Garrett, age four, and Howard, age six, for a week-long family vacation. On 30 June 2003, Mrs. Biggers left the cottage to pick up her sister and brother-in-law, Susan Matthews (“Mrs. Matthews”) and Tim Matthews (“Mr. Matthews”) (collectively, “the Matthews”) from the ferry landing. Mrs. Biggers drove the golf cart provided by Odell; Garrett and Howard rode in the front seat with her. After picking up the Matthews, the family returned to the cottage where they picked up Mr. Biggers and prepared for a day at the beach. Mrs. Biggers drove along Keelson Row and through a “reverse ‘S’ ” turn both to and from the ferry landing.

Plaintiffs, Garrett, Howard, and the Matthews packed the golf cart with chairs and towels, and they drove to the beach. The party again traveled along Keelson Row and through the reverse “S” turn. Shortly after arriving at the beach, Mrs. Matthews announced that Mr. Matthews’s brother and sister-in-law also were coming to the

1. The Village is a coastal community with a maximum speed limit of eighteen miles per hour within its municipal boundaries. Therefore, bicycles and electric vehicles, such as golf carts, are common means of transportation.

2. Limited previously had entered into an exclusive rental agency agreement with Odell for the use of his property as vacation rental property. Pursuant to the agreement, Odell was responsible for providing the cottage a “four-passenger electric vehicle with side curtains, charger and fire extinguisher, registered with the Village” In exchange for a commission on the rental receipts, Limited agreed to rent the property and to perform various management and housekeeping services.

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Village that day. The Matthews, along with Howard and Garrett, left the beach and drove Odell's golf cart to pick up the Matthews' family members.

Mr. Matthews drove the golf cart; Garrett sat in the middle of the front seat; and Howard sat on the outside of the passenger-side of the front seat. Mrs. Matthews sat in the golf cart's right, rear seat. Mrs. Matthews and Howard sang children's songs as the party again approached the reverse "S" curve on Keelson Row. As they approached the curve, Mrs. Matthews extended her right arm in a protective manner. Howard turned in his seat so that his back was facing out of the cart with his right hip pointing toward the dashboard. Howard then fell out of the cart. Mrs. Matthews yelled for Mr. Matthews to stop the cart because he did not notice that Howard had fallen out of the cart.

The Matthews took Howard back to the cottage. Howard complained that his head hurt. Mrs. Matthews stayed with Howard at the cottage while Mr. Matthews, his brother and sister-in-law, and Garrett returned to join plaintiffs at the beach. Mr. Matthews told plaintiffs that he believed Howard was all right.

Howard's condition worsened, and Emergency Medical Services were called approximately two hours after Howard's fall. Fourteen months later, on 14 August 2004, Howard died from complications resulting from a traumatic brain injury caused by his fall from the golf cart.

On 16 September 2005, plaintiffs brought this negligence action alleging that (1) the Village negligently failed to require seatbelts for electric vehicles operating within its jurisdiction; (2) Limited negligently failed to require seatbelts in the electric vehicles owned by the property owners; and (3) Odell negligently failed to install seatbelts in his golf cart. On 8 August 2007, Limited moved for summary judgment. On 15 August 2007, both the Village and Odell moved for summary judgment. Plaintiffs appeal from the trial court's orders granting summary judgment in defendants' favor.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). "An issue is 'genuine' if it can be proven by substantial evidence[,] and a fact is 'material' if it would constitute or irrevocably establish any material element of a

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claim or a defense.” *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citing *Bone Int’l, Inc. v. Brooks*, 304 N.C. 371, 374-75, 283 S.E.2d 518, 520 (1981)).

In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving party. *See Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004). We review an order allowing summary judgment *de novo*. *Summey*, 357 N.C. at 496, 586 S.E.2d at 249.

The moving party bears the burden of showing that no triable issue of fact exists. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citing *Texaco, Inc. v. Creel*, 310 N.C. 695, 699, 314 S.E.2d 506, 508 (1984)). “Even though summary judgment is seldom appropriate in a negligence case, summary judgment may be granted in a negligence action where there are no genuine issues of material fact and the plaintiff fails to show one of the elements of negligence.” *Lavelle v. Shultz*, 120 N.C. App. 857, 859, 463 S.E.2d 567, 569 (1995) (citing *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983)), *disc. rev. denied*, 342 N.C. 656, 467 S.E.2d 715 (1996). Furthermore,

[i]n order to survive a motion for summary judgment, plaintiff must establish a *prima facie* case of negligence by showing: (1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff’s injury; and (3) a person of ordinary prudence should have foreseen that plaintiff’s injury was probable under the circumstances.

Lavelle, 120 N.C. App. at 859-60, 463 S.E.2d at 569 (citing *Talian v. City of Charlotte*, 98 N.C. App. 281, 283, 390 S.E.2d 737, 739 (1990), *aff’d*, 327 N.C. 629, 398 S.E.2d 330 (1990) (per curiam)) (emphasis added).

[1] In plaintiffs’ first argument on appeal, plaintiffs contend that the trial court erred in granting summary judgment in favor of the Village because there is a genuine issue of material fact as to whether the Village waived its governmental immunity by purchasing liability insurance. However, plaintiffs’ underlying argument is that the Village was negligent because it failed to enact an ordinance requiring the

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installation of seatbelts in golf carts traveling within its municipal boundaries. We disagree.

“The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.” N.C. Const. art. I, § 6. “A violation of the separation of powers doctrine occurs when one branch of state government exercises powers that are reserved for another branch of state government.” *County of Cabarrus v. Tolson*, 169 N.C. App. 636, 639, 610 S.E.2d 443, 446 (2005) (citing *Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 631, 577 S.E.2d 650, 652 (2003)). Thus, it long has been the rule that

when a general authority is given to a municipal corporation, to be exercised through its proper legislative officers, to make ordinances for the good government, health and safety of the inhabitants and their property, it is thereby left entirely to the discretion of those authorities to determine what ordinances are proper for those purposes.

Hill v. The Bd. of Alderman of the City of Charlotte, 72 N.C. 55, 56 (1875) (per curiam) (holding that the plaintiff could not recover from the city for fire damage to his property caused by firecrackers because the decision of the municipal authorities to suspend temporarily an ordinance prohibiting firecrackers was within the authorities’ discretion). Otherwise, a court “would arrogate to itself the legislative power of the city authorities, and it cannot be supposed possible that any court will be guilty of such an usurpation.” *Id.* at 57. The Court explained that “the question, whether [the municipal authorities’ decision is] wise or not, is not for a court to determine.” *Id.* Therefore, “[a] municipal corporation is not liable to an action for damages either for the non-exercise of, or for the manner in which, in good faith, it exercises discretionary powers of a public or legislative character.” *Id.* (emphasis added) (citation and quotation marks omitted).

In a case similar to the case *sub judice*, *Goodwin v. Town of Reidsville*, 160 N.C. 411, 76 S.E. 232 (1912), our Supreme Court affirmed the trial court’s entry of nonsuit against the plaintiff’s wrongful death claim against the town. *Goodwin*, 160 N.C. at 414, 76 S.E. at 234. The decedent was driving along the town’s street when he was struck and killed by a baseball from a game being played by boys in the street. *Goodwin*, 160 N.C. at 412, 76 S.E. at 233. The town knew of the boys’ custom of playing baseball in the street, but the town failed

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to adopt or enforce an ordinance prohibiting their activities. *Id.* Notwithstanding the plaintiff's tragic loss, the town's decision was inviolate. *Goodwin*, 160 N.C. at 414, 76 S.E. at 234.

Accordingly, in view of our well-established precedent, the Village's failure to adopt an ordinance requiring the installation of seatbelts on golf carts is beyond the purview of our courts. Therefore, we hold that the trial court properly entered summary judgment in favor of the Village.

[2] Next, plaintiffs argue that the trial court erred in granting summary judgment in favor of Limited and Odell. Specifically, plaintiffs contend that Limited and Odell breached a duty of care by (1) renting a golf cart without a seatbelt to plaintiffs, and (2) failing to provide warning of the purportedly hidden danger of falling out of the golf cart. We disagree.

In *Roberts v. William N. & Kate B. Reynolds Mem'l Park*, 281 N.C. 48, 53, 187 S.E.2d 721, 724 (1972), our Supreme Court instructed that a bailor for hire has a duty "to see that the vehicle bailed is in good condition," and although the bailor is not an insurer, "he is liable for injury to the bailee or a third person proximately caused by a defect in the vehicle of which [the bailor] had knowledge or which he could have discovered [through] reasonable care and inspection." *Id.* In *Roberts*, the plaintiff was injured by a golf cart when the cart's brakes failed to perform properly. *Id.* The plaintiff alleged that the golf cart he had rented was equipped with defective brakes. *Roberts*, 281 N.C. at 54, 187 S.E.2d at 724. The plaintiff subsequently presented evidence that the golf cart was designed so that the cart's brakes should work regardless of whether the cart traveled backwards or forwards. *Roberts*, 281 N.C. at 52, 187 S.E.2d at 723. Upon those facts, the Court held that the plaintiff had presented sufficient evidence that the bailor was liable for the hidden, defective condition of the brakes such that the plaintiff could reach the jury. *Roberts*, 281 N.C. at 60, 187 S.E.2d at 728.

In the case *sub judice*, we initially note that although plaintiffs' arguments tend toward the contrary, plaintiffs' complaint sounds in negligence, not products liability, and the undisputed fact remains that the golf cart was manufactured without seatbelts. With the exception of three superficial modifications³, the cart was in the

3. Pursuant to his agreement with Limited, Odell added (1) a sticker which instructed the user as to basic cart operation and alerted the cart's user to additional vacation and safety reference materials in the rental house, and (2) a fire extinguisher;

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same or similar condition as it had been provided to Odell by the manufacturer.

In addition, the record contains an invoice for bi-monthly service to the golf cart. The invoice is dated 12 June 2003—approximately two weeks prior to Howard’s fall. No description of special repairs, maintenance, or other service appears on the invoice. Plaintiffs make no argument that Odell failed to meet his duty of exercising reasonable care and inspection. Nor do they argue that the golf cart was not in good operating condition. Here, any defect alleged by plaintiffs—the absence of a seatbelt—is an open and obvious condition, and the condition in which the golf cart originally was provided to Odell by the manufacturer.

Mr. Matthews testified that he (1) had played approximately fifteen rounds of golf per year, (2) had belonged to a country club several years prior to Howard’s fall, (3) had used a golf cart whenever he had played golf, and (4) never had seen a golf cart with a seatbelt prior to his vacation with plaintiffs. We cannot find in our case law an affirmative duty for defendants such as Limited and Odell to undertake to alter a commonly manufactured product, such as a golf cart. Therefore, we hold that Limited and Odell met the duty of care owed by bailors of vehicles to bailees. *See Roberts*, 281 N.C. at 53, 187 S.E.2d at 724.

In addition to being properly maintained, the golf cart also was insured as required by the Village and by Limited’s contract with Odell. Therefore, it appears that Odell and Limited were in compliance with any contractual duties or duties established by the Village. Plaintiff cites no other source from which a duty of care may arise.

Upon review, we are convinced that plaintiff’s negligence claims against Limited and Odell fail for want of duty, or where a duty does exist, for want of breach. Accordingly, we affirm the trial court’s entry of summary judgment in favor of Limited and Odell. *See Lavelle*, 120 N.C. App. at 859, 463 S.E.2d at 569.

While we acknowledge the tragic circumstances presented, the law of negligence as regards defendants in the case *sub judice* does not provide a remedy for plaintiffs’ loss. For the foregoing reasons, we affirm the trial court’s orders granting summary judgment in favor of defendants.

and (3) Odell testified at his deposition that he also added a “wind/rain screen” as an “optional extra” after purchasing the cart, but that everything other than the screen and the fire extinguisher “was standard with the cart.”

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Affirmed.

Judges STEELMAN and STROUD concur.

ROBERT STUTTS, AND ALL OTHER SIMILARLY SITUATED INDIVIDUALS OR ENTITIES WHO ARE PRESENT OR FORMER POLICYHOLDERS OF WORKERS COMPENSATION INSURANCE POLICIES ISSUED BY THE DEFENDANTS WHEREON THE DEFENDANTS NEVER WAS AT RISK ON SUCH POLICIES AND WHO HAVE NEVER BEEN REFUNDED INSURANCE PREMIUMS PAID FOR SUCH POLICIES, PLAINTIFFS v. THE TRAVELERS INDEMNITY COMPANY, ST. PAUL TRAVELERS INSURANCE COMPANY, TRAVELERS PROPERTY AND CASUALTY, THE TRAVELERS INSURANCE GROUP INC., THE TRAVELERS GROUP AND THE TRAVELERS INSURANCE COMPANY, DEFENDANTS

No. COA09-52

(Filed 15 September 2009)

1. Insurance— filed rate doctrine—workers' compensation premiums—no employees—unfair trade practices claim

Summary judgment was properly granted for defendants on an unfair trade practices claim where plaintiff sought a refund of his workers' compensation premium. Plaintiff's claim was barred by the filed rate doctrine, which provides that a plaintiff may not claim damages on the ground that an approved rate is excessive because it is the product of unlawful conduct.

2. Insurance— workers' compensation—exposure to risks—no refund of premium

Plaintiff was not entitled to a refund of workers' compensation insurance premiums for a period during which he did not cover himself and had no employees. Defendants were nevertheless exposed to the risks in the policies because plaintiff could have hired an employee during this period.

Appeal by plaintiff from order entered 28 October 2008 by Judge Robert F. Floyd, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 10 June 2009.

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The Law Office of James M. Johnson, by James M. Johnson; Brent Adams & Associates, by Brenton D. Adams, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Richard T. Rice and Carrie A. Hanger, for defendants-appellees.

HUNTER, Robert C., Judge.

Plaintiff Robert Stutts appeals from the trial court's entry of summary judgment to defendants The Travelers Indemnity Company, St. Paul Travelers Insurance Company, Travelers Property and Casualty, The Travelers Insurance Group Inc., The Travelers Group, and The Travelers Insurance Company. Plaintiff's main contention on appeal is that the "filed rate" doctrine is inapplicable in this case and thus the trial court erred in entering summary judgment on that basis. Because we conclude that the "filed rate" doctrine does apply and bars plaintiff's claim, we affirm.

Facts

In March 2003, plaintiff started his own business hauling concrete and other materials for his sole customer, Fayetteville Block Materials, Inc. ("Fay Block Materials"). Plaintiff was the sole owner and operator of the business. In March 2003, plaintiff applied for a workers' compensation insurance policy through the residual or involuntary market known as the The North Carolina Workers' Compensation Insurance Plan or the "assigned risk plan." Plaintiff obtained a workers' compensation policy covering the period of 21 March 2003 through 21 March 2004 ("2003 policy"). On 21 March 2004, plaintiff renewed the policy for a second year, covering the period of 21 March 2004 through 21 March 2005 ("2004 policy"). The North Carolina Rate Bureau assigned defendants as the servicing issuance carrier for both policies.

The policies defendants issued to plaintiff provided workers' compensation and employer liability coverage for any employee that plaintiff might hire during the policy periods. Plaintiff elected to exclude himself from coverage on both policies and did not hire any employees during either policy period.

On 27 January 2005, plaintiff was injured while hauling concrete for Fay Block Materials. Plaintiff filed a workers' compensation claim against Fay Block Materials on 11 February 2005 for the injuries sustained during the accident. Defendants denied liability on the ground

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that plaintiff was not covered by the workers' compensation insurance policy that he had purchased, and the North Carolina Industrial Commission dismissed his case.

Plaintiff paid a premium of \$850.00 for the 2003 policy and \$850.00 for the 2004 policy. Defendants conducted an audit in 2004, which confirmed that plaintiff had no employees during the 2003 policy period, and defendants provided him with a premium reimbursement of \$568.00. Plaintiff cancelled the 2004 policy on 5 March 2005, and a subsequent audit showed that he had no employees during this period either. Defendants provided him with a \$575.00 prorated premium reimbursement. Plaintiff demanded that defendants refund the entire remaining premium balances.

On 12 March 2008, plaintiff filed a complaint, alleging that defendants had engaged in unfair and deceptive trade practices in violation of Chapter 75 and Chapter 58 of the General Statutes and that he was entitled to: (1) a full refund of the premiums he paid, plus interest; (2) treble damages; (3) punitive damages ; and (4) attorney's fees. On 28 April 2008, defendants moved to dismiss plaintiff's complaint for failure to state a claim for relief and failure to exhaust administrative remedies. Subsequently, on 13 May 2008, plaintiff filed a complaint with the Rate Bureau, which denied plaintiff's claim for a refund on 21 August 2008.

On 8 September 2008, plaintiff filed an amended complaint, claiming that he had exhausted his administrative remedies. On 19 September 2008, defendants supplemented their motion to dismiss, asserting that plaintiff's claim was barred by the "Filed Rate Doctrine." On 7 October 2008, plaintiff moved for summary judgment. The trial court converted defendants' motion to dismiss into a motion for summary judgment, granted summary judgment to defendants, and dismissed plaintiff's claim with prejudice. Plaintiff timely appealed to this Court.

Discussion

Plaintiff contends that the trial court erred in granting summary judgment to defendants. "Summary judgment is properly granted when the forecast of evidence 'reveals no genuine issue as to any material fact, and when the moving party is entitled to a judgment as a matter of law.' " *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)). "In ruling on a motion for summary judgment, 'the court may consider the pleadings, depositions, admis-

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sions, affidavits, answers to interrogatories, oral testimony and documentary materials.’ ” *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (quoting *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E.2d 214, 217 (1975)). The moving party bears the burden of establishing the lack of any triable issue of fact, *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985), and all the evidence produced must be considered in the light most favorable to the non-moving party, *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). On appeal, an order granting summary judgment is reviewed de novo. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006).

[1] On appeal, plaintiff argues that summary judgment was improper because his forecast of evidence sets out a prima facie case for unfair and deceptive trade practices under Chapter 75 and Chapter 58 of the General Statutes. Defendants, on the other hand, contend that summary judgment was proper because, as they argued in support of their motion in the trial court, the “filed rate” doctrine bars plaintiff’s claim in this case.

“The filed rate doctrine provides that a plaintiff may not claim damages on the ground that a rate approved by a regulator as reasonable is nonetheless excessive because it is the product of unlawful conduct.” *N.C. Steel, Inc. v. National Council on Compensation Ins.*, 347 N.C. 627, 632, 496 S.E.2d 369, 372 (1998). In *N.C. Steel*, the Supreme Court explained that any legal challenge implicating the rates of the Commissioner is necessarily precluded by the “filed rate” doctrine:

[T]he jury in this case would have had “to measure the difference between the properly approved workers’ compensation insurance rates paid by plaintiffs and those mythical rates which would have been applicable but for the defendants’ concerted activity. This undertaking is not within the province of the courts but should reside with the respective state regulators with authority over rate-setting.”

Id. at 637, 496 S.E.2d at 375 (quoting *Uniforce Temporary Personnel, Inc. v. Nat’l Council on Compensation Ins., Inc.*, 892 F. Supp. 1503 (S.D. Fla. 1995), *aff’d*, 87 F.3d 1296 (11th Cir. 1996)).

After our Supreme Court’s adoption of the “filed rate” doctrine in *N.C. Steel*, this Court specifically held that the doctrine may apply to claims brought under Chapter 75:

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[A]fter rates have been set by a regulator, those rates may not be collaterally attacked. The proper venue for questions involving rates is through the Insurance Commissioner and not a court or a jury. The filed rate doctrine precludes a plaintiff from requesting a recalculation of the rates the Commissioner would have set absent the alleged illegal conduct of a defendant. The “General Assembly has given the Insurance Commissioner the duty of setting rates. The Commissioner, aided by his staff, has the expertise to determine proper rates.” The filed rate doctrine applies in the context of a suit under N.C. Gen. Stat. § 75-1 et seq.

Lupton v. BCBS of N.C., 139 N.C. App. 421, 424-25, 533 S.E.2d 270, 272-73 (quoting *N.C. Steel*, 347 N.C. at 632, 496 S.E.2d at 372) (internal citations omitted), *disc. review denied*, 353 N.C. 266, 546 S.E.2d 105 (2000).

The General Assembly created the Rate Bureau to perform numerous functions, including “the promulgation of rates” with respect to “workers’ compensation and employers’ liability insurance written in connection therewith” N.C. Gen. Stat. § 58-36-1(1) (2007). Pertinent here, N.C. Gen. Stat. § 58-36-1 further specifies the duties of insurers with respect to the residual or involuntary insurance market:

It is the duty of every insurer that writes workers’ compensation insurance in this State and is a member of the Bureau, as defined in this section and G.S. 58-36-5 to insure and accept any workers’ compensation insurance risk that has been certified to be “difficult to place” by any fire and casualty insurance agent who is licensed in this State. When any such risk is called to the attention of the Bureau by receipt of an application with an estimated or deposit premium payment and it appears that the risk is in good faith entitled to such coverage, the Bureau will bind coverage for 30 days and will designate a member who must issue a standard workers’ compensation policy of insurance that contains the usual and customary provisions found in those policies. . . . The Bureau will make and adopt such rules as are necessary to carry this section into effect, subject to final approval of the Commissioner. As a prerequisite to the transaction of workers’ compensation insurance in this State, every member of the Bureau that writes such insurance must file with the Bureau written authority permitting the Bureau to act in its behalf, as provided in this section, and an agreement to accept risks that are assigned to the member by the Bureau, as provided in this section.

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N.C. Gen. Stat. § 58-36-1(5)(a). Thus, according to the statute, all insurers that write workers' compensation insurance policies in North Carolina—including defendants—must be members of the Rate Bureau and are required to "accept" and insure workers' compensation risks "designated" to them by the Rate Bureau.

Pursuant to N.C. Gen. Stat. § 58-36-15(a) (2007), the Rate Bureau is required to file with the Commissioner of Insurance "copies of the rates, loss costs, classification plans, rating plans and rating systems used by its members." The Commissioner must then either approve these filings as complying with the requirements of Chapter 58 or hold a hearing regarding "in what respect and to what extent" the Commissioner considers the filings to be non-compliant. N.C. Gen. Stat. § 58-36-20 (2007).

Here, the applicable rating rules adopted by the Rate Bureau and approved by the Commissioner are set out in Rules 3A 6 and 3A 16 in the Basic Manual. According to those rating rules, an insurer, including defendants, must charge a minimum annual deposit premium of \$850.00 for workers' compensation insurance policies, subject to adjustment on a final annual audit. Rule 3A 6. Under the rules, where the insured is a sole proprietor without employees, as is plaintiff, the minimum premium for classification "Code 8810" must be charged. Rule 3A 16.

Two "circulars" from the Rate Bureau to member insurers provide the applicable minimum premium rates that were approved by the Commissioner for "Code 8810." For plaintiff's 2003 policy with defendants, the applicable circular provides that the minimum premium is \$282.00. As for plaintiff's 2004 policy, the relevant circular specifies a \$288.00 minimum premium, which was later prorated after audit to \$275.00 for 349 days of coverage.

The evidence in the record establishes that defendants charged and collected from plaintiff the applicable premiums that they were required to charge and collect under the rating rules approved by the Commissioner. This conclusion is supported by the Rate Bureau's letter denying plaintiff claim for relief:

Travelers did not violate any provisions of the North Carolina statutes or the rules and procedures provided for in the Basic Manual in its calculation and collection of the minimum premiums for the coverage requested by Mr. Stutts. *Minimum premiums include the "expense constant," a \$210.00 premium*

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charge that is applied to every assigned risk policy regardless of premium size to contribute to the recovery of expenses common to issuing, recording, and auditing a policy. As we are sure the parties are aware, there are costs incurred by companies in issuing, maintaining and auditing a workers compensation policy even if it is ultimately determined that no employees were hired by the employer during the policy period.

(Emphasis added.)

In issuing plaintiff his workers' compensation policies, defendants acted in accordance with the governing rating rules filed by the Rate Bureau and approved by the Commissioner. Despite plaintiff's characterization of his claim as "nothing more than a breach of contract action," at bottom, it is defendants' adherence to these requirements for charging and collecting minimum premiums that is the gravamen of plaintiff's complaint. Because "plaintiff[] cannot prove [his] claim without the rates set by the Commissioner being questioned[,] the "filed rate" doctrine precludes him from collaterally challenging those rates. *N.C. Steel*, 347 N.C. at 636, 496 S.E.2d at 374. Instead, "[t]he proper venue for questions involving rates is through the Insurance Commissioner and not a court or a jury." *Lupton*, 139 N.C. App. at 424, 533 S.E.2d at 272.

[2] Plaintiff nevertheless argues that he is entitled to a full refund of his premiums—not just the portions already refunded by defendants—because no risk of loss ever attached under the policies that defendants issued and thus the policies failed for lack of consideration. Defendant specifically contends that since he elected not to cover himself under the policies and because he did not hire any employees during the policy periods, defendants knew or should have known that the policies were worthless "ghost policies" and that defendants had incurred no risk. In support of his contention, plaintiff relies on *Latta v. Farmers County Mutual Fire Ins. Co.*, 67 N.C. App. 494, 496, 313 S.E.2d 214, 215-16, *disc. review denied*, 311 N.C. 401, 319 S.E.2d 270 (1984), in which this Court held: "It is an established principle of insurance law that an insurer must return premiums where, without fault or fraud by the insured, no risk to the insurer ever attaches under the policy. In such a case, the premiums have been paid upon a consideration which has failed."

Although plaintiff argues that no risk of loss ever attached under his policies with defendants, he does not dispute that the policies provided workers' compensation and employer liability coverage for any

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employees plaintiff might have hired during the policy periods. Despite the fact that plaintiff elected to not include himself in the coverage and ultimately did not hire any employees, there nonetheless existed the possibility that plaintiff might hire an employee and a risk that the employee would file a workers' compensation claim. Under their policies, defendants would have been obligated to defend plaintiff and pay any workers' compensation benefits that accrued during the policy periods. Thus, plaintiff's insurance coverage was in effect during the policy periods and exposed defendants to the risks specified in the policies—plaintiff's decision to exclude himself from coverage and to not hire any employees does not change that fact. *See* 44 Am. Jur. 2d *Insurance* § 915 (2009) ("If the risk does not or cannot attach, or if no part of the interest insured is subject to any of the specified perils, the insurer cannot claim or retain the premium, in the absence of any fraud or fault on the part of the insured."). Risk of loss attached to both the 2003 and 2004 policies, providing adequate consideration to support the policies. Plaintiff is, therefore, not entitled to recover the entire amount of premiums paid.

Affirmed.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA v. ROBERT GREGORY BOYD

No. COA09-142

(Filed 15 September 2009)

1. Constitutional Law— right to counsel—forfeiture—obstructing and delaying proceedings—substitute counsel denied

The trial court did not abuse its discretion by denying defendant's motion for substitute counsel in an indecent liberties prosecution. Although the trial court did not make the N.C.G.S. § 15A-1242 inquiry, defendant forfeited his right to counsel by willfully obstructing and delaying proceedings. Forfeiture does not require a knowing and voluntary waiver.

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2. Evidence—credibility of victim—admission not plain error

There was no plain error in an indecent liberties prosecution in the admission of testimony from a social worker that the victim's disclosure was plausible and consistent. Given the other evidence, it was unlikely that the jury would have reached a different result without this testimony.

3. Sentencing—prior record level—no stipulation by pro se defendant

The trial court erred by determining a *pro se* defendant's prior record level on the basis of a worksheet prepared by the State without any stipulation by defendant.

Appeal by defendant from judgment entered 9 September 2008 by Judge Quentin T. Sumner in the Halifax County Superior Court. Heard in the Court of Appeals 20 August 2009.

Attorney General Roy Cooper, by Assistant Attorney General Angenette R. Stephenson, for the State.

Ryan McKaig for defendant.

BRYANT, Judge.

On 6 August 2007, defendant Robert Gregory Boyd was indicted on one count of indecent liberties with a minor for offenses committed 22 April 2007 against his daughter. During the 8 September 2008 term of the Halifax County Superior Court, a jury convicted defendant on this charge. After determining defendant's prior record level of III, the trial court sentenced him to twenty-one to twenty-six months imprisonment. Defendant appealed. On 17 March 2009, defendant moved to strike the second argument in his brief and his sixth assignment of error; this Court granted the motion on 2 April 2009. We find no error at trial but vacate and remand for resentencing.

Facts

On 11 August 2008, defendant's second appointed counsel, Sam Barnes, moved to withdraw from the case, citing disagreements over trial strategy and communication problems with his client. Although defendant supported Mr. Barnes' motion to withdraw, the trial court denied it. Defendant's original appointed counsel had been permitted to withdraw in June 2008 over disagreements with defendant regarding trial strategy, specifically the original counsel's refusal to file

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motions for recusal of one superior court judge and subpoena of another. On 8 September 2008, defendant filed his own motion, styled “Motion to Have the Trial Court Recuse Itself from Hearing this Case,” which stated in its entirety: “Alma L [sic] Hinton And Quentin T [sic] Sumner Has [sic] Fixed One Trial Already, I Have Proof[.]” The trial court denied this motion without making any findings of fact or conclusions of law. When defendant requested entry of findings and conclusions, the trial court replied, “I am not talking to you about any grounds. I am denying your motion.” Mr. Barnes then renewed his motion to withdraw. Barnes’ second motion to withdraw, dated 8 September 2008, stated in relevant part:

4. That during said meeting the Defendant was totally uncooperative with the undersigned counsel to the extent said counsel was unable prepare any type of defense to the charges.

5. That during said meeting the Defendant stated to the undersigned counsel that he did not wish for said counsel to represent him at the trial of these matters and requested of counsel to ask the Court to be released in these matters.

9. That on September 2, 2008 the Defendant came into the undersigned counsel’s office, whereupon, said counsel again, attempted to explain to the Defendant that his case would be tried, by a jury, on September 8, 2008 and in order for said counsel to properly represent the Defendant he needed to assist counsel in the preparation of his defense. Whereas, the Defendant repeatedly told the undersigned counsel that “this case was not going to be tried,” and that if counsel could not represent him in the way he (the Defendant) wanted him to, then he (the Defendant) did not wish for this counsel to represent him in these matters. The Defendant further stated to the undersigned counsel that he (the Defendant) “did not trust” the undersigned counsel and did not wish for said counsel to represent him at the trial of these matters.

The trial court allowed the motion to withdraw and then instructed defendant that his trial was to begin at two o’clock that afternoon, and that he would have to represent himself if he could not locate counsel. When defendant did not procure private counsel, the trial court appointed Mr. Barnes as standby counsel and the trial proceeded.

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The evidence at trial tended to show the following: The victim was defendant's daughter, aged eleven years at the time of the offense. Defendant and the victim's mother never married, but had lived together off and on for twelve years. In April 2007, they were not living together, but the victim's mother took the victim and her younger brother for an overnight visit in defendant's home. After the brother was asleep, defendant asked the victim to play cards and suggested they do so in the bedroom so as not to wake the brother. The victim agreed and defendant locked the bedroom door. However, instead of playing cards, defendant asked the victim to put lotion on his back. After a few minutes, defendant told the victim she wasn't doing it right and offered to show her the right way. Defendant had the victim remove her shirt and began rubbing lotion on her back and legs, eventually touching her vagina. Defendant asked the victim how this felt and repeatedly asked, "You aren't going to tell anyone, are you?" The victim told defendant to stop and later called her grandmother to pick her up. At trial, Officer Winifred Bowens, the patrol sergeant who interviewed the victim on the night of the offense, read the victim's statement before the jury. Pamela Crowell of the Halifax County Department of Social Services testified regarding what the victim had told her during interviews about the incident. Jessica Doshier, a forensic interviewer and social worker from the Tedi Bear Children's Advocacy Center in Greenville, testified about her interview of the victim and a video of the interview was played for the jury. Ms. Doshier also read a line from her written report stating that the victim's "disclosure was plausible and consistent."

On appeal, defendant contends the trial court erred in: I) denying his motion for substitute counsel and thus requiring him to represent himself; II) allowing certain social worker testimony which amounted to commenting on the credibility of the victim; and III) finding defendant a prior record level III offender.¹ For the reasons discussed below, we find no error at trial. However, we vacate defendant's sentence and remand for resentencing.

I

[1] Defendant first argues that the trial abused its discretion in "denying [his] motion for substitute counsel and requiring [him] to

1. In his brief, defendant also argued that the trial court erred in failing to enter findings of fact and conclusions of law supporting its order denying defendant's motion for recusal. However, on 2 April 2009, we granted defendant's motion to strike this argument.

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represent himself at trial.” We disagree and conclude that defendant forfeited his right to counsel.

We begin by noting that defendant did not move for substitute counsel before or during his trial. While defendant supported Mr. Barnes’ motion to withdraw, he never requested appointment of substitute counsel thereafter. Defendant now urges this Court to treat his comments to the trial court that he was not receiving a fair trial as such a motion, but we decline to do so. After a careful review of the transcript, we find nothing that could reasonably constitute a motion or request for substitute counsel. Therefore, that portion of defendant’s argument is inapposite and we overrule his seventh assignment of error. However, defendant has adequately preserved and raised the issue of waiver of his right to counsel.

An indigent defendant has the right to have competent counsel appointed to represent him. *State v. Robinson*, 290 N.C. 56, 64, 224 S.E.2d 174, 178-79 (1976). This right to counsel “also implicitly gives a defendant the right to refuse counsel and conduct his or her own defense.” *State v. Thacker*, 301 N.C. 348, 353-54, 271 S.E.2d 252, 256 (1980) (citing *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975)). “[T]he waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will.” *Id.* at 354, 271 S.E.2d at 256. Pursuant to N.C. Gen. Stat. § 15A-1242, a trial court is required to conduct an inquiry in every case in which a defendant wishes to proceed *pro se*. *State v. McLeod*, 197 N.C. App. —, —, —, S.E.2d —, — (2009).

Here, the record shows the trial court failed to conduct the section 15A-1242 inquiry, which under most circumstances is considered a prejudicial error entitling defendant to a new trial. *State v. Dunlap*, 318 N.C. 384, 389, 348 S.E.2d 801, 805 (1986).² However, the State contends that defendant forfeited his right to counsel by his behavior and we agree.

In *State v. Montgomery*, we explained the difference between waiver and forfeiture of counsel:

2. We also note that while the trial court did appoint standby counsel to defendant, this is not an acceptable substitute for the right to counsel in the absence of a knowing and voluntary waiver. *Dunlap*, 318 N.C. at 387-88, 348 S.E.2d at 804.

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“Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant’s knowledge thereof and irrespective of whether the defendant intended to relinquish the right.” *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d. Cir. 1995). A forfeiture results when “the state’s interest in maintaining an orderly trial schedule and the defendant’s negligence, indifference, or possibly purposeful delaying tactic, combine[] to justify a forfeiture of defendant’s right to counsel. . .” La Fave, Israel, & King Criminal Procedure, § 11.3(c) at 548 (1999). “[A] defendant who misbehaves in the courtroom may forfeit his constitutional right to be present at trial,” and “a defendant who is abusive toward his attorney may forfeit his right to counsel.” *U.S. v. McLeod*, 53 F.3d 322, 325 (11th Cir. 1995).

138 N.C. App. 521, 524-25, 530 S.E.2d 66, 69 (2000). Because forfeiture does not require a knowing and voluntary waiver of the right to counsel, the inquiry pursuant to section 15A-1242 is not required in such cases. *Id.* at 525, 530 S.E.2d at 69.

“Any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel.” *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006). “A defendant may lose his constitutional right to be represented by the counsel of his choice when the right to counsel is perverted for the purpose of obstructing and delaying a trial.” *Id.* at 649, 634 S.E.2d at 917 (citations omitted). In *Quick*, we held that defendant’s failure to retain counsel over eight months constituted obstruction and delay of the proceedings and warranted forfeiture.³ *Id.* at 650, 634 S.E.2d at 918.

Here, defendant likewise obstructed and delayed the trial proceedings. The record indicates that defendant was uncooperative with counsel to the extent that both his court-appointed attorneys withdrew. Defendant’s original appointed counsel had been permitted to withdraw in June 2008 over disagreements with defendant including counsel’s refusal to file a motion for recusal of Judge Sumner on grounds that various superior judges were in collusion to fix the trial. In Mr. Barnes’ first motion to withdraw, he stated that defendant did not want him as counsel and that he could not effectively communi-

3. The Court in *Quick* held that the defendant “both knowingly and voluntarily waived his right to appointed counsel and, through his own acts, forfeited his right to proceed with the counsel of his choice.” *Id.* at 650, 634 S.E.2d at 918.

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cate with defendant. In Mr. Barnes' second motion to withdraw, he stated that defendant had been "totally uncooperative . . . to the extent [Mr. Barnes] was unable to prepare any type of defense to the charges." Further, "[d]efendant repeatedly told [Mr. Barnes] that 'this case was not going to be tried'" Based on this evidence in the record, we conclude that defendant willfully obstructed and delayed the trial court proceedings by refusing to cooperate with either of his appointed attorneys and insisting that his case would not be tried. Thus, defendant forfeited his right to counsel.

II

[2] Defendant next argues that the trial court's admission of Ms. Doshier's opinion that the victim's statements were plausible and consistent constituted plain error. We disagree.

Because defendant failed to object to the testimony at issue during trial, we consider his contentions under the plain error standard N.C.R. App. P. 10(c)(4) (2009). "Plain error has been defined as " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. Maready*, 362 N.C. 614, 621, 669 S.E.2d 564, 568 (2008) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks and citation omitted) (emphasis in original)).

"It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury . . . [and thus] an expert's opinion to the effect that a witness is credible, believable, or truthful is inadmissible." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995). "[T]he admission of such an opinion is plain error when the State's case depends largely on the prosecuting witness's credibility." *Id.* For example, in *State v. Holloway*, we found plain error in experts' opinions of a child's truthfulness when the child testified to sexual abuse not leaving physical injury, and the defendant testified to the contrary and presented evidence of a normal relationship with the child. 82 N.C. App. 586, 587, 347 S.E.2d 72, 73 (1986). In that case the child did not report the alleged incident until more than four weeks later and there was no suggestion of changed behavior, immediately after or subsequently. *Id.*

Here, in contrast, beyond the victim's testimony, the State also presented evidence that the victim, upset and crying, called her grandmother to pick her up early, gave consistent statements to her mother, Officer Bowens, Department of Social Services staff, and Ms.

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Dosher, and exhibited changed behavior following the alleged incident. Defendant did not testify. This additional evidence was such that it is unlikely that the jury would have reached a different conclusion absent Ms. Dosher's testimony about consistency and plausibility. This assignment of error is overruled.

III

[3] Finally, defendant argues the trial court erred in determining his prior record level as III on the basis of a worksheet prepared by the State without any stipulation by defendant. We agree and vacate and remand for resentencing.

Errors at sentencing are preserved without objection. *State v. Hargett*, 157 N.C. App. 90, 92, 577 S.E.2d 703, 705 (2003). The State may prove a defendant's prior record level by stipulation, through court or other official records, or by "[a]ny other method found by the court to be reliable." N.C. Gen. Stat. §15A-1340.14(f) (2009). "There is no question that a worksheet, prepared and submitted by the State, purporting to list a defendant's prior convictions is, without more, insufficient to satisfy the State's burden in establishing proof of prior convictions." *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002). The State contends that defendant effectively "stipulated" to the worksheet by failing to object to it during sentencing. We have held that "a defendant need not make an affirmative statement to stipulate to his or her prior record level . . . , particularly if defense counsel had an opportunity to object to the stipulation in question but failed to do so." *State v. Alexander*, 359 N.C. 824, 829, 616 S.E.2d 914, 918 (2005). In that case, defendant's counsel "specifically stated that 'up until this particular case he had no felony convictions, as you can see from his worksheet' [indicating] not only that defense counsel was cognizant of the contents of the worksheet, but also that he had no objections to it." *Id.* at 830, 616 S.E.2d at 918.

Here, however, defendant was acting *pro se* and made no such comment from which we can infer a stipulation. The transcript reveals that when the worksheet was presented at sentencing, defendant asked the court, "What does that mean?" Defendant's question makes plain that he did not understand the worksheet, much less stipulate to it. The court informed defendant that the worksheet meant that he had "seven prior conviction points for purposes of sentencing, which would mean you would be what is known as a Level 3 for a class F felony." After asking defendant to stand, the

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court asked if he had anything to say, to which defendant stated his desire to appeal. This exchange is unlike that between the court and counsel in *Alexander*, and we see no evidence of stipulation by defendant to his prior record level. Defendant is entitled to a new sentencing hearing.

NO ERROR AT TRIAL.

VACATED AND REMANDED FOR RESENTENCING.

Judges Calabria and Elmore concur.

STATE OF NORTH CAROLINA v. MICKEY VONRICE ROLLINS

No. COA07-380-2

(Filed 15 September 2009)

1. Appeal and Error— motion to suppress improperly denied—plea agreement admitting guilt—per se prejudice

When a defendant has properly preserved the right to appeal the denial of a motion to suppress evidence at trial, then accepts a plea agreement and admits guilt, and an appellate court of this State subsequently determines that defendant's motion to suppress was improperly denied, defendant is *per se* prejudiced.

2. Confessions and Incriminating Statements— motion to suppress—voluntariness—new hearing granted

The trial court erred in a first-degree murder case by denying defendant's motion to suppress statements he made to his wife while he was incarcerated, which he contends were not voluntary. The trial court did not provide a rationale for its ruling at the suppression hearing and, did not make written conclusions and the case is remanded to the trial court for a new suppression hearing.

3. Appeal and Error— preservation of issues—new hearing already granted

Although defendant in a first-degree murder case contends that the trial court erred by denying his motion to suppress

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because statements he made to his wife while he was incarcerated were involuntary, this issue does not need to be addressed because defendant was granted a new suppression hearing on the issue.

Appeal by Defendant from order on Defendant's motions to suppress entered 19 August 2005 by Judge William C. Griffin, Jr. and from judgment dated 6 October 2006 by Judge Jack W. Jenkins in Superior Court, Martin County. Heard in the Court of Appeals originally on 14 November 2007, and opinion filed 18 March 2008. Opinion reversed and case remanded to the Court of Appeals for further consideration by order of the North Carolina Supreme Court on 1 May 2009.

Attorney General Roy Cooper, by Special Attorney General Robert C. Montgomery, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for Defendant-Appellant.

McGEE, Judge.

Defendant was indicted on charges of first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and breaking or entering on 2 February 2004. Defendant filed a motion to suppress on 13 September 2004 and an affidavit in support of that motion on 15 September 2004. Defendant sought to suppress all statements he had made to his wife, Tolvi Rollins, on several grounds, including (a) "the statements . . . constitute confidential marital communications under N.C. Gen. Stat. § 8-57(c)" and (b) the statements were involuntary pursuant to the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Defendant filed a separate additional motion to suppress, along with an affidavit in support thereof, on 20 June 2005. In the latter motion, Defendant sought to suppress any statements he had made to Officer Timothy Troball (Officer Troball) while Defendant was in custody. The trial court entered an order denying both of Defendant's motions to suppress on 19 August 2005.

Defendant subsequently entered an *Alford* plea to the charge of first-degree murder, reserving his right to appeal the denial of his motions to suppress under N.C. Gen. Stat. § 15A-979(b) (2007) which states: "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." Pursuant to the plea

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agreement, the State dismissed the charges of first-degree kidnapping, robbery with a dangerous weapon, and breaking or entering. The trial court sentenced Defendant to a term of life in prison without the possibility of parole. Defendant appealed.

In *State v. Rollins*, 189 N.C. App. 248, 658 S.E.2d 43 (2008) (*Rollins I*), Defendant raised four issues on appeal, arguing: (1) the trial court erred in failing to suppress Defendant's statements obtained by Defendant's wife because they were protected by marital privilege; (2) the trial court erred in failing to suppress Defendant's statements obtained by his wife because they were not legally voluntary; (3) the trial court erred in denying Defendant's voluntariness claim because the trial court failed to make appropriate findings of fact and conclusions of law; and (4) the trial court erred in failing to suppress a statement Defendant made to a correctional officer because Defendant was in custody, and the officer's questions amounted to an interrogation without proper *Miranda* warnings.

In *Rollins I*, our Court held that Defendant's first and fourth arguments had merit, and ordered a new trial for Defendant. Our Court made no holdings on Defendant's second and third arguments, as our holding on Defendant's first argument rendered those arguments moot. The State petitioned our Supreme Court for discretionary review of this Court's decision as to Defendant's first argument only, and the Supreme Court granted discretionary review only as to that issue.

The Supreme Court of North Carolina filed an opinion on 1 May 2009 in *State v. Rollins*, 363 N.C. 232, 675 S.E.2d 334 (2009) (*Rollins II*), reversing our holding in *Rollins I* on Defendant's first issue, and remanding the case to the Court of Appeals "for consideration of defendant's assignments of error not previously addressed by that court." The Supreme Court limited its 1 May 2009 opinion to Defendant's first issue only; our Court's holding granting Defendant a new trial on the fourth issue addressed in *Rollins I* stands. Additional facts may be found in *Rollins I* and *Rollins II*.

I.

In *Rollins I*, Defendant argued the trial court erred by denying his motion to suppress statements he made to his wife while incarcerated. Specifically, Defendant argued the trial court erred by concluding that Defendant's statements to his wife, made while Defendant was incarcerated, lacked the requisite expectation of privacy and

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were not confidential marital communications. Defendant argued that the challenged statements should have been excluded under N.C. Gen. Stat. § 8-57(c), which provides: “No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage.” N.C. Gen. Stat. § 8-57(c) (2007). In *Rollins I*, our Court agreed with Defendant on this issue. As stated above, our Supreme Court reversed the holding of our Court, and held that “defendant had no reasonable expectation of privacy in the conversations between his wife and him in the public visiting areas of the [Department of Correction] facilities, the conversations were not confidential communications under subsection 8-57(c) and therefore, are not protected.” *Rollins II*, 363 N.C. at 241, 675 S.E.2d at 340.

II.

In *Rollins I*, our Court further held that Defendant was entitled to a new trial on Defendant’s fourth argument because the trial court erred in denying Defendant’s motion to suppress Defendant’s statement to Officer Troball. *Rollins I*, 189 N.C. App. at 262-63, 658 S.E.2d at 52. Our Supreme Court was not requested to review, and did not review, this determination of our Court. Thus, our Supreme Court’s opinion in *Rollins II* did not overturn this holding. Therefore, our remand for a new trial based on Defendant’s fourth argument stands.

[1] North Carolina’s appellate courts have not addressed the effect a reversal of a trial court’s decision not to suppress evidence has on a guilty plea on facts similar to those in the case before us. However, the “Official Commentary” to N.C. Gen. Stat. § 15A-979 (2007) states:

subsection (b) . . . permits a defendant whose motion to suppress was denied to plead guilty and then appeal the ruling of the judge on the motion. If the appellate court sustains the ruling on the motion, the conviction stands; if the ruling on the motion is overturned, then the defendant is entitled to a new trial at which the evidence would be suppressed. This provision is intended to prevent a defendant whose only real defense is the motion to suppress from going through a trial simply to preserve his right of appeal.

Though not specifically on point, cases from our Supreme Court provide support for the proposition that Defendant should be given the benefit of the bargain he made with the State for his guilty plea;

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he agreed to plead guilty only after his motions to suppress were denied and upon the condition that he could appeal the denial of those motions.

“When viewed in light of the analogous law of contracts, it is clear that plea agreements normally arise in the form of unilateral contracts. The consideration given for the prosecutor’s promise is not defendant’s corresponding promise to plead guilty, but rather is defendant’s actual performance by so pleading.” In the instant case, defendant’s plea of guilty was consideration given for the prosecutor’s promise. He was entitled to receive the benefit of his bargain. However, defendant is not entitled to specific performance in this case because such action would violate the laws of this state. Nevertheless, defendant may avail himself of other remedies. He may withdraw his guilty plea and proceed to trial on the criminal charges. He may also withdraw his plea and attempt to negotiate another plea agreement that does not violate N.C.G.S. § 14-52.

State v. Wall, 348 N.C. 671, 676, 502 S.E.2d 585, 588 (1998) (quoting *State v. Collins*, 300 N.C. 142, 149, 265 S.E.2d 172, 176 (1980)) (our Supreme Court voided a plea agreement because it violated the laws of this State); see also *State v. Ellis*, 361 N.C. 200, 206-07, 639 S.E.2d 425, 429 (2007).

We find the reasoning in the “Official Commentary” to N.C. Gen. Stat. § 15A-979 sound, and agree that Defendant should receive the benefit of the bargain made prior to his acceptance of the plea agreement. We hold that when a defendant has properly preserved the right to appeal the denial of a motion to suppress evidence at trial, then accepts a plea agreement and admits guilt, and subsequently an appellate court of this State determines that the defendant’s motion to suppress was improperly denied, the defendant is *per se* prejudiced by the improper denial of that motion to suppress. We reach this determination in the present case because, absent the improper denial of Defendant’s motion to suppress, Defendant may have decided not to enter a guilty plea, or may have been able to negotiate more favorable terms with the State for his plea agreement, had he decided to take that route.

III.

[2] In Defendant’s third argument, he contends that the trial court erred in denying his motion to suppress statements he made to his

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wife while he was incarcerated, which he contends were not voluntary, because the trial court failed to make the appropriate findings of fact or conclusions of law. We agree.

“G.S. 15A-977(d) provides that if the motion to suppress is not determined summarily, the judge must make the determination after a hearing and findings of fact. Subparagraph (f) provides that ‘the judge must set forth in the record his findings of fact and conclusions of law.’ ” *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980).

When the competency of evidence is challenged and the trial judge conducts a voir dire to determine admissibility, the general rule is that he should make findings of fact to show the bases of his ruling. If there is a material conflict in the evidence on voir dire, he *must* do so in order to resolve the conflict. If there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. In that event, the necessary findings are implied from the admission of the challenged evidence.

Here, although further findings were inadvertently omitted by the trial judge, he did specifically conclude that the officer had probable cause to effect the arrest—a conclusion based upon the State’s undisputed evidence. There was no evidence to the contrary. Under the circumstances of this case, we hold that denial of the motion to suppress without further specific findings of fact does not constitute prejudicial error.

Id. at 685-86, 268 S.E.2d at 457 (internal citations omitted) (emphasis in original). “It is not error per se for the trial court to omit findings of fact [in support of its ruling on a motion to suppress].” *State v. McQueen*, 324 N.C. 118, 128, 377 S.E.2d 38, 44 (1989). In *Phillips*, our Supreme Court found no prejudicial error, even though the trial court failed to make any written findings, because the trial court had made the following statement following the presentation of the evidence and arguments at the suppression hearing:

“ ‘The Court finds that under the undisputed evidence offered in this case, on this point, the officer had probable cause to effect the arrest and that the subsequent search was not outside of the scope of the permitted authority of the arresting officer.

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Therefore, I would deny the motion to suppress. Further findings will be made in due course when the Court has had time to prepare those in the absence of the jury.’ ”

Phillips, 300 N.C. at 685, 268 S.E.2d at 457 (citations omitted). Our Supreme Court’s opinions concerning this issue have been limited to instances where the trial court made specific conclusions of law concerning its denial of a defendant’s motion to suppress, but failed to make findings of fact to support those conclusions. Our Supreme Court has reasoned that the appropriate findings could be inferred by the trial court’s conclusions and ultimate denial of the motion to suppress. So long as there is no material conflict in the evidence before the trial court, the absence of specific findings do not amount to prejudicial error *per se*. *Id.* at 685-86, 268 S.E.2d at 457.

Our Court has also addressed this issue, holding no prejudicial error in instances where the trial court made no written findings or conclusions supporting its denial of a defendant’s motion to suppress. *See State v. Thompson*, 187 N.C. App. 341, 350, 654 S.E.2d 486, 492 (2007) (“[T]he trial court’s findings, as announced in court and implied from its admission of [a witness]’ identification of [the defendant], were supported by [the witness]’ testimony. ‘Therefore, the scope of our inquiry is limited to the superior court’s conclusions of law, which “are fully reviewable on appeal.” ’ ”) (citations omitted); *State v. Shelly*, 181 N.C. App. 196, 204, 638 S.E.2d 516, 523 (2007) (“[T]he trial court did not err when it failed to enter written findings because ‘the trial court did provide its rationale from the bench.’ ”) (citations omitted); *State v. Jacobs*, 174 N.C. App. 1, 8, 620 S.E.2d 204, 209 (2005), *vacated in part, reversed in part, and remanded on other grounds*, 361 N.C. 565, 648 S.E.2d 841 (2007) (“In the instant case, the record indicates that although the trial court failed to make any written findings and conclusions to support its denial of [the defendant’s] motion to suppress, the trial court did provide rationale from the bench.”); *see also State v. Tate*, 58 N.C. App. 494, 499, 294 S.E.2d 16, 19 (1982).

In the case before us, the trial court’s sole statement at the suppression hearing concerning Defendant’s motions to suppress his wife’s testimony was: “As to the statements made in the prison, I’m going to deny the motion to suppress[.]” The trial court did subsequently enter written findings and conclusions. The findings concerning conversations between Defendant and his wife while Defendant was incarcerated are general in nature, and do not address

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the ultimate issues presented by Defendant's motions to suppress. The trial court's sole conclusion of law concerning Defendant's statements to his wife while he was in prison was: "[D]efendant's statements to his wife . . . while . . . [D]efendant was incarcerated . . . lack the requisite expectation of confidentiality, and therefore are not considered confidential marital communications under N.C.G.S. 8-57."

The trial court made no written conclusion of law concerning Defendant's motion to suppress based upon Defendant's argument that his statements were not "voluntary." The trial court provided no rationale at the suppression hearing for its denial of Defendant's motions to suppress his wife's statements under either of Defendant's theories: marital communications privilege or voluntariness. The fact that the trial court made written findings and made a written conclusion of law with respect to Defendant's argument that his statements to his wife constituted confidential marital communications, raises doubt as to whether the trial court considered Defendant's voluntariness argument. Because the trial court failed to provide any basis or rationale for its denial of Defendant's motion to suppress Defendant's statements to his wife based on Defendant's argument that the statements were not legally "voluntary," we must direct the trial court on remand to conduct a new suppression hearing on this issue, and provide adequate rationale for its ruling. We again urge the trial courts of this State to remember "it is always the better practice to find all facts upon which the admissibility of the evidence depends." *Phillips*, 300 N.C. at 685, 268 S.E.2d at 457. We hold that Defendant is entitled to a new suppression hearing on the issue of the voluntariness of his statements to his wife.

[3] Because we have held that Defendant is entitled to a new suppression hearing on the issue of the voluntariness of the statements Defendant made to his wife while he was incarcerated, we do not address Defendant's second argument, in which Defendant contends the trial court erred by denying his motion to suppress on this issue.

New trial.

Judges BRYANT and GEER concur.

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[200 N.C. App. 113 (2009)]

STATE OF NORTH CAROLINA v. JOSEPH KEVIN CAUSBY, DEFENDANT

No. COA08-1533

(Filed 15 September 2009)

Sexual Offenders—satellite-based monitoring—level of supervision—risk assessment

The trial court erred by determining that defendant required the highest level of supervision and monitoring after his guilty plea to the charge of taking indecent liberties with a child because the findings of fact were insufficient to support this determination and the State only presented evidence that defendant was a moderate risk.

Appeal by defendant from order entered 31 July 2008 by Judge Laura J. Bridges in Rutherford County Superior Court. Heard in the Court of Appeals 23 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Carol Ann Bauer for defendant-appellant.

GEER, Judge.

Defendant Joseph Kevin Causby appeals from the trial court's order enrolling him in a satellite-based monitoring ("SBM") program for 36 months upon completion of his sentence and any term of post-release supervision. This Court's recent decision in *State v. Kilby*, 198 N.C. App. —, 679 S.E.2d 430 (2009), controls and requires the conclusion, in this case, that the trial court's determination that defendant requires the highest level of supervision and monitoring—withstanding the assessment by the Department of Correction ("DOC") that defendant was a moderate risk for reoffending—is unsupported by the evidence. We, therefore, reverse.

Facts

Defendant was indicted on 4 February 2008 for one count of taking indecent liberties with a child. Defendant pled guilty to the charge on 30 April 2008. The plea arrangement provided that sentencing would be continued to 28 July 2008 and that the State would recommend a probationary sentence. Sentencing actually took place on 30 July 2008. The trial court found as mitigating factors that

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defendant had accepted responsibility for his criminal conduct and that defendant had a support system in the community. The trial court determined that a mitigated sentence was justified and sentenced defendant in the mitigated range to a term of 15 to 18 months imprisonment.

On the following day, 31 July 2008, the trial court conducted a hearing to determine whether defendant should be enrolled in an SBM program. At that hearing, the State presented the testimony of Probation Parole Officer Brian Branch, who had performed the DOC Risk Assessment that was set out in the Static-99 Form, which was also submitted to the trial court. Officer Branch testified that out of the three recidivism risk levels—low, moderate, and high—defendant had a “moderate” risk assessment. Although the State also moved the admission of a written statement of a nurse practitioner describing the offense that resulted in the indecent liberties charge, the trial court excluded the statement based on defendant’s objection. Defendant’s counsel referred the trial court to a Sentencing Plan admitted in the previous day’s sentencing hearing that reported the results of a sex offender-specific evaluation, which concluded that defendant “is a moderately-low risk for reoffense.”

The trial court entered an order on AOC form AOC-CR-615, relying upon only the typewritten findings already set out in the form, including the findings (1) that defendant had committed an offense involving the physical, mental, or sexual abuse of a minor and (2) that defendant “requires the highest possible level of supervision and monitoring based on the Department of Correction’s risk assessment program.” The trial court ordered that defendant be enrolled in an SBM program for 36 months following completion of defendant’s sentence and any term of post-release supervision. Defendant timely appealed to this Court from the trial court’s 31 July 2008 order.

Discussion

This Court’s recent decision in *Kilby*, 198 N.C. App. at —, 679 S.E.2d at 432-33, involved N.C. Gen. Stat. § 14-208.40B (2007), the SBM statute that applies when an offender was convicted of a reportable offense in the past, but the trial court had not previously determined whether the offender should be required to enroll in an SBM program. This case, however, involves N.C. Gen. Stat. § 14-208.40A, the statute applicable when the district attorney has requested that the trial court consider SBM during sentencing. Nevertheless, the analysis in *Kilby* is equally applicable here.

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As this Court recognized in *Kilby*, a trial court's SBM determination involves two phases: a "qualification" phase and a "risk assessment" phase. *Id.* at —, 679 S.E.2d at 433. In the qualification phase, if a defendant was convicted of a reportable offense as defined by N.C. Gen. Stat. § 14-208.6(4) (2007), then the "district attorney shall present to the court any evidence" that the defendant falls into one of five categories: "(i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor." N.C. Gen. Stat. § 14-208.40A(a). Upon receipt of the evidence from the State and any contrary evidence from the offender, the trial court is required to determine "whether the offender's conviction places the offender" in one of the five categories and to "make a finding of fact of that determination," specifying the category into which the offender falls. N.C. Gen. Stat. § 14-208.40A(b).

In this case, there is no dispute that defendant pled guilty to a reportable conviction as defined by N.C. Gen. Stat. § 14-208.6(4). The trial court, based on the State's evidence, further found that defendant's offense involved the physical, mental, or sexual abuse of a minor. The case then moved to the risk assessment phase.

N.C. Gen. Stat. § 14-208.40A(d) provides that "[i]f the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that the offense is not an aggravated offense or a violation of G.S. 14-27.2A or G.S. 14-27.4A and the offender is not a recidivist, the court shall order that the Department [of Correction] do a risk assessment of the offender." Upon receipt of that risk assessment, "the court shall determine whether, based on the Department's risk assessment, the offender requires the highest possible level of supervision and monitoring." N.C. Gen. Stat. § 14-208.40A(e). If, as occurred in this case, the trial court determines that the offender does require the highest possible level of supervision and monitoring, then the trial court "shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court." *Id.*

With respect to the risk assessment phase, in *Kilby*, as in this case, the DOC risk assessment concluded that defendant posed a "moderate" risk of reoffending. 198 N.C. App. at —, 679 S.E.2d at 434. The trial court in that case, using the same AOC form used here,

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nonetheless found that the defendant “ ‘requires the highest possible level of supervision and monitoring.’ ” *Id.* at —, 679 S.E.2d at 434. The *Kilby* trial court, like the trial court here, made no further findings of fact to support this determination.

This Court first held:

Although we cannot discern any direct correlation between the designation of low, moderate or high risk by the DOC assessment and the terminology of N.C. Gen. Stat. § 14-208.40B(c) which directs the determination of whether an offender may “require the highest possible level of supervision and monitoring,” N.C. Gen. Stat. § 14-208.40B(c), the trial court made no findings of fact which could justify the conclusion that “defendant requires the highest possible level of supervision and monitoring.” The trial court erred by concluding that “defendant requires the highest possible level of supervision and monitoring.” The findings of fact are insufficient to support the trial court’s conclusion that “defendant requires the highest possible level of supervision and monitoring” based upon a “moderate” risk assessment from the DOC.

Id. at —, 679 S.E.2d at 434.

The *Kilby* panel then addressed whether the case should be remanded for further findings of fact:

The State did not present evidence which could support a finding that “defendant requires the highest possible level of supervision and monitoring.” The DOC assessment of defendant rated him as a moderate risk. The State’s other evidence indicated that defendant was fully cooperating with his post release supervision, which might support a finding of a lower risk level, but not a higher one. As no evidence was presented which tends to indicate that defendant poses a greater than “moderate” risk or which would demonstrate that “defendant requires the highest possible level of supervision and monitoring[,]” we need not remand this matter to the trial court for additional findings of fact as requested by the State. Consequently, we reverse the trial court’s order.

Id. at —, 679 S.E.2d at 434.

In this case, the trial court’s findings of fact were identical to the findings in *Kilby*. Since the DOC determined in this case, as in

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Kilby, that defendant was a moderate risk, *Kilby* requires the conclusion that the trial court's findings of fact are insufficient to support the determination that defendant requires the highest possible level of supervision and monitoring. With respect to the sufficiency of the evidence, the only evidence presented by the State was the DOC assessment of "moderate" risk and the officer's brief explanation of how that assessment was reached. Thus, the State only presented evidence that defendant was a moderate risk and presented no evidence that defendant needed the highest possible level of supervision and monitoring.

Implicitly acknowledging that the State's evidence at the hearing was insufficient to support the trial court's ultimate determination, the State, on appeal, points to the Sentencing Plan relied upon by defendant at the hearing. Although it is not entirely clear that this Plan was actually admitted into evidence at the SBM hearing, the Plan reported "that [defendant] is a moderately-low risk for re-offense."

The State, however, after noting that assessment, points to the portion of the report where the doctor making the assessment of moderately-low risk also made various recommendations related to sentencing. The State asserts on appeal that those recommendations "are at odds with the assessment of moderately-low risk" and "are at odds with the DOC Risk Assessment." A review of those recommendations does not immediately lead to that conclusion, and, in any event, the State presented no evidence in the trial court to support the assertions made in its brief about defendant's degree of risk. The State cannot support a trial court's order by proffering its own "expert" opinion on appeal, unsupported by testimony or documentary evidence, about the meaning of a doctor's recommendations. Moreover, the State cites no authority that would permit the trial court to disregard the DOC's risk assessment in the manner urged by the State on appeal.

We, therefore, believe that *Kilby* controls. The State presented no evidence supporting the trial court's determination that defendant requires the highest possible level of supervision and monitoring. "As the DOC assessed defendant herein as a 'moderate' risk and the State presented no evidence to support findings of a higher level of risk or to support the requirement for 'the highest possible level of supervision and monitoring[.],' the trial court's order is reversed." *Id.* at —, 679 S.E.2d at 434. Since we have reversed the trial court's order, we need not address defendant's remaining arguments.

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Reversed.

Judges BRYANT and STEPHENS concur.

STATE OF NORTH CAROLINA v. CHARLES JEROME FAULK, DEFENDANT

No. COA09-148

(Filed 15 September 2009)

Rape; Sexual Offenses— statutory rape—statutory sexual offense—birthday rule—motion to dismiss improperly granted

The trial court erred by granting defendant's motion to dismiss the charges of statutory rape and statutory sexual offense under N.C.G.S. § 14-27.7A(b) because the trial court incorrectly applied the birthday rule resulting in the improper calculation of the victim's age.

Appeal by the State from order entered 31 October 2008 by Judge Thomas H. Lock in Columbus County Superior Court. Heard in the Court of Appeals 11 June 2009.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

Scott C. Dorman for defendant.

ELMORE, Judge.

The State appeals from the trial court's grant of a motion to dismiss charges of statutory rape and statutory sexual offense against Charles Jerome Faulk (defendant). Because the trial court incorrectly applied the law, we reverse.

On 10 April 2008, defendant was indicted for statutory rape of a person who is 13, 14, or 15 years old; statutory sexual offense of a person who is 13, 14, or 15 years old; and second degree kidnapping stemming from an incident between defendant and a minor on 14 January 2007. The parties stipulated that defendant's date of birth was 9 June 1987 and the victim's birthday was 6 November 1991, making their respective ages on the date of the incident 19 years, 7 months, and 5 days old for defendant and 15 years, 2 months, and 8

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days old for the alleged victim. Before any evidence was presented to the trial court, defendant made a motion to dismiss the charges, arguing that the State could not prove one of the elements of N.C. Gen. Stat. § 14-27.7A(b), under which the two sexual offense charges were brought. Specifically, he argued:

5. The crime for which the defendant is charged has an age requirement that states that the Defendant must be more than 4 years older than the victim.
6. If you count the number of days between the victim's DOB and the Defendant's DOB, and divide by 365 and one quarter, you get 4 years and 5 months. If you apply the birthday rule as stated in State v. Moore, 167 NC App 495 [*sic*], then the Defendant is four years older than the victim, not more than four.

The court issued an order granting the motion and stating as follows:

2. The statute has the language which states that for this to be a crime that the Defendant must be "more than 4 but less than six years older" than the victim.
3. That the Court and the attorneys for the parties could find no case law concerning the application of what "more than 4" means, with regard to this section of the statute.
4. That the Court of Appeals has ruled in the same statute that the "Birthday Rule" applies when calculating the age of the victim "where the victim is age 13, 14, or 15 years old", in that when a person turns 15 years old, that they are 15 years old until they turn 16 years old.
5. That if you count the number of days between the defendant's birthday and the victim's birthday and divide by 365, you get 4 with a remainder of 147 days. This is the method the State feels should govern, and it makes the Defendant 4 years and 4 months and 27 days older than the Victim.
6. If you apply the Birthday Rule as found in North Carolina case law, then the Defendant is 19 and the Victim is 15, and that is 4 years apart, not more than 4 years.
7. That since the Court of Appeals has used the Birthday Rule in calculating the age of the victim for the purposes of "13, 14, or 15" in the same statute, the Birthday Rule should be applied to the age difference between the Defendant and the Victim.

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The court concludes by ordering:

1. The Birthday Rule should be applied when calculating the differences in age for the purposes of the Statutory Sex crimes in this case.
2. That when the Court uses the Birthday Rule in applying the age differences in this case, it finds that the Defendant is not more than 4 years older than the Victim.
3. Since the Defendant is not more than 4 years older than the Defendant, the Defendant cannot be guilty of the crime.
4. [The counts of statutory rape and statutory sexual assault] of the indictment in Columbus County 07 CRS 50286 are thereby dismissed.

The State argues that the trial court misconstrued and misapplied the Birthday Rule and the statute. We agree.

The case referenced and relied on by the court in its order is *State v. Moore*, 167 N.C. App. 495, 606 S.E.2d 127 (2004). *Moore* also concerned the issue of measuring age as applied to statutory rape charges. There, this Court stated:

Under the “birthday rule,” a person reaches a certain age on her birthday and remains that age until her next birthday. Applying this rule, [the victim] reached the age of fifteen on 25 June 2001, which was her birthday (anniversary of her birth) and remained fifteen until 25 June 2002. Thus, she was fifteen for the purposes of N.C.G.S. § 14-27.7A on 27 June 2001 when she and defendant had sexual intercourse.

Id. at 504, 606 S.E.2d at 133 (citation omitted). Thus, for the purpose of the statute, to determine a person’s chronological age, one takes the date of the offense and subtracts the date of birth. In this case, then, the relevant ages are 19 years, 7 months, and 5 days for defendant, and 15 years, 2 months, and 8 days for the victim. Per *Moore*, then, the victim is considered 15 years old. The court came to the same conclusion regarding the parties’ respective ages, though it rounded both ages down to whole years, describing defendant as 19 and the victim as 15. This was likely rooted in another statement in *Moore*—specifically, “the fair meaning of ‘15 years old[.]’ . . . includes children during their fifteenth year, until they have reached their sixteenth birthday.” *Id.* at 503, 606 S.E.2d at 132 (citation and quota-

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tions omitted). Thus, in terms of calculating a person's age for the purpose of this statute, the victim is fifteen years old until her sixteenth birthday—that is, she is considered fifteen years old until she turns sixteen years old on her next birthday. In that sense, *Moore* is applicable to the case at hand.

However, unlike defendant in the case at hand, the defendant in *Moore* was charged with violating N.C. Gen. Stat. § 14-27.7A(a). Defendant here is charged with violating N.C. Gen. Stat. § 14-27.7A(b). The two parts of the statute read:

(a) A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

(b) A defendant is guilty of a Class C felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old *and the defendant is more than four but less than six years older than the person*, except when the defendant is lawfully married to the person.

N.C. Gen. Stat. § 14-27.7A (2007) (emphasis added).

Where the trial court erred was in applying the reasoning of *Moore* used to calculate the age of the victim to the calculation of time in part (b). That is, both defendant and the trial court calculated the portion of the statute that states “more than four but less than six years older” in the same way that *Moore* calculates age: just as the victim is fifteen years old until she is sixteen years old, the difference in ages is four years until it is exactly five years. This is a misapplication of the Birthday Rule in *Moore*. The distinction is that the emphasized portion of part (b) above requires a calculation of *time*, not of *age*. Thus, the logical interpretation is that it means four years and zero days to six years and zero days, or anywhere in the range of 1460 days to 2190 days. As the State notes, interpreting it as defendant does would mean, in essence, that “four to six years” means “five years.” Neither our legislature nor this Court deals only in whole integers of years, and, as such, this argument must fail. So too does defendant's argument that a plain language analysis of the statute requires this Court to consider the everyday conversational meaning of age differences—that is, if one's sibling were 21 months older, the person would say “my brother is two years older than I am,” even

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though that is not technically true. It seems hardly necessary to state that the rules of polite conversation are less technical and rigorous than statutes via which our General Assembly creates class C felonies. Defendant's argument on this point fails.

Because we reverse the trial court's order on this point, we do not address the State's other arguments.

Reversed and remanded.

Judges BRYANT and CALABRIA concur.

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[200 N.C. App. 123 (2009)]

STATE OF NORTH CAROLINA v. JOSEPH DWAYNE MORROW, DEFENDANT

No. COA08-867

(Filed 6 October 2009)

1. Constitutional Law— *ex post facto*—satellite-based monitoring (SBM)—new requirement

Mandatory (SBM) of a defendant convicted of indecent liberties did not violate the *ex post facto* clause of the United States Constitution where the requirement did not exist when the offense was committed. Issues regarding implementation of the SBM policy were not raised by either party.

2. Constitutional Law— void for vagueness—not raised at trial

A void for vagueness argument not raised at trial was dismissed on appeal.

3. Sexual Offenders— satellite-based monitoring (SBM)—notice of hearing

An argument concerning the lack of notice of SBM was not addressed where defendant received timely notice of the SBM hearing and was represented by counsel at the hearing.

4. Sexual Offenders— satellite-based monitoring (SBM)—notice of criteria

An argument concerning the absence of notice to a sex offender of the criteria for SBM was dismissed where defendant did not seek to refute the State's evidence or to offer any other evidence. However, the types of evidence that might be presented by the Department of Correction (DOC) may be gained through reference to the statutes and DOC guidelines.

5. Sexual Offenders— satellite-based monitoring (SBM)—determined by trial court

A Department of Correction (DOC) rating of high risk is not a necessary prerequisite to SBM under N.C.G.S. § 14-208.40B(c); the trial court is not limited by DOC's risk assessment and may hear any admissible evidence relevant to the risk presented by defendant. In this case, there was evidence from a probation revocation hearing immediately preceding the SBM hearing that defendant had failed to attend sexual abuse treatment sessions. The matter was remanded for additional evidentiary proceedings and more thorough findings.

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6. Sexual Offenders— satellite-based monitoring (SBM)— definite time

A case involving the SBM of a sex offender was remanded for the trial court to set a definite time for the monitoring.

Judge ELMORE concurring in part and dissenting in part.

Appeal by defendant from order entered on 19 February 2008 by Judge Henry E. Frye, Jr. in Superior Court, Wilkes County. Heard in the Court of Appeals 11 February 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Peter A. Regulski, for the State.

Mark Montgomery, for defendant-appellant.

STROUD, Judge.

Defendant was ordered to enroll in satellite-based monitoring (“SBM”) for seven to ten years pursuant to his 16 November 2006 no contest plea to indecent liberties with a child. Defendant presents three issues for this Court’s review: (1) whether requiring SBM enrollment on the basis of crimes committed before enactment of the SBM statutory scheme violates the *Ex Post Facto* Clause of the United States Constitution, (2) whether the procedure for determining SBM enrollment violates the Due Process Clause of the United States Constitution, and (3) if the SBM statutory scheme is otherwise constitutionally sound on its face, whether the trial court’s findings of fact supported its legal conclusion that defendant must be enrolled in SBM for seven to ten years. For the following reasons, we conclude defendant’s constitutional claims are without merit, but remand for additional findings of fact.

I. Background

On 16 November 2006, defendant pled no contest to two counts of indecent liberties with a child. He was sentenced to 18 to 22 months on each count. The two sentences were suspended and defendant was placed on 36 months supervised probation. As a condition of his probation, defendant was required, *inter alia*, to “enroll in [a] sex offender control program, receive psychological treatment for depression, substance abuse, and specific sex offender treatment includig [sic] treatment outside Wilkes County.”

On 20 December 2007, defendant’s probation officer filed a probation violation report in Superior Court, Wilkes County. The report

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alleged four violations, including that defendant inexcusably missed seven scheduled sessions of his sexual abuse treatment program. On 8 January 2008, the Department of Correction (“DOC”) notified defendant¹ that it would seek continuous SBM of his movements pursuant to the “bring back” provisions of N.C. Gen. Stat. § 14-208.40B.² The trial court held a hearing on 19 February 2008 to address both the probation violation report and SBM.

At the hearing, defendant admitted the allegations in the probation violation report. The trial court revoked his probation and activated his sentence for 11 months, with an additional 36 months of probation upon his release from prison.

Immediately following the revocation of defendant’s probation, the trial court heard evidence on whether to enroll defendant in SBM. The trial court received the Sheriff’s Incident/Investigation Report for the underlying crimes and the DOC’s STATIC-99 Risk Factor Worksheet³ as evidence.

1. The record does not contain a copy of any notice of an SBM hearing served on defendant, but he did not dispute the testimony of the probation officer that notice was personally served on 8 January 2008.

2. N.C. Gen. Stat. § 14-208.40B reads, in pertinent part,

(a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), and there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring, the Department shall make an initial determination on whether the offender falls into one of the categories described in G.S. 14-208.40(a).

(b) If the Department determines that the offender falls into one of the categories described in G.S. 14-208.40(a), the Department shall schedule a hearing in the court of the county in which the offender resides. The Department shall notify the offender of the Department’s determination and the date of the scheduled hearing by certified mail sent to the address provided by the offender pursuant to G.S. 14-208.7. The hearing shall be scheduled no sooner than 15 days from the date the notification is mailed. Receipt of notification shall be presumed to be the date indicated by the certified mail receipt.

N.C. Gen. Stat. § 14-208.40B (2007).

3. “The STATIC-99 Risk Assessment is an actuarial instrument designed to estimate the probability of sexual and violent recidivism among male offenders who have already been convicted of at least one sexual offense against a child or non-consenting adult.” N.C. Dep’t of Correction Policies-Procedures, No. VII.F Sex Offender Management Interim Policy 9 (2007). The Department of Correction uses the STATIC-99 risk assessment to determine levels of supervision required for offenders. *Id.* The STATIC-99 factors include: (1) the age of the offender, (2) whether the offender has “ever lived with a lover for at least two years[,]” (3) non-sexual violence convictions, (4) prior sexual offense charges and convictions, (5) prior sentencing dates, (6) convictions for non-contact sex offenses, (7) any unrelated victims, (8) stranger victims, or (9) male victims.

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At the hearing, defense counsel objected to SBM enrollment on the grounds that defendant was assessed as “moderate risk [while] the Statute talks about the highest possible type of supervision. He would [also] raise the . . . claim . . . of due process—ex post facto violations, and just for notice of monitoring[.]” The trial court made oral findings in open court, but no written findings, that DOC had assessed defendant as moderate risk, but because defendant “was 16 or 17 years of age, approximately 11 to 12 years older than the victim[.]” he should be given “the highest level of supervision[.]” Accordingly, the trial court ordered defendant to enroll in SBM for seven to ten years. Defendant appeals the SBM enrollment order.

II. Standard of Review

This Court established the standard of review for SBM enrollment in *State v. Kilby*, — N.C. App. —, —, 679 S.E.2d 430. *Kilby* first noted that the trial court is statutorily required to make findings of fact to support its legal conclusions. *Id.* (citing N.C. Gen. Stat. § 14-208.40B(c) (2007)). *Kilby* further stated:

[W]e review the trial court’s findings of fact to determine whether they are supported by competent record evidence, and we review the trial court’s conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found. We [then] review the trial court’s order to ensure that the determination that defendant requires the highest possible level of supervision and monitoring reflects a correct application of law to the facts found.

— N.C. App. at —, 679 S.E.2d at 432 (citations, quotation marks and brackets in original omitted).

III. Findings of Fact

Defendant does not dispute either of the trial court’s findings at the SBM hearing: (1) that he was assessed at moderate risk by the DOC and (2) that he was eleven or twelve years older than the victim. Therefore, they are “presumed to be supported by competent evidence and [are] binding on appeal.” *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted).

IV. Constitutional Issues

Defendant contends that the SBM enrollment statutory scheme (1) violates the *Ex Post Facto* Clause because it increases the punishment for a crime after the crime is committed and (2) violates the

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Due Process Clause because the statute (i) is void for vagueness and (ii) does not provide a defendant with notice and opportunity to be heard. We disagree.

A. *Ex Post Facto* Clause

[1] Defendant argues that because “mandatory GPS monitoring did not exist” on the date he committed the underlying offense, the SBM statute violated the *Ex Post Facto* Clause of the United States Constitution by increasing his permissible punishment after the offense was committed. However, this Court carefully considered and overruled an identical challenge to the SBM statute in *State v. Bare*, — N.C. App. —, —, 677 S.E.2d 518, 531 (2009). *Bare* controls the instant case and we therefore overrule this argument. *Id.*

We recognize, as noted by the dissent, that there may be serious legal issues raised by the DOC’s manner of execution of SBM under some provisions of the N.C. Department of Correction Policies-Procedures, No. VII.F Sex Offender Management Interim Policy (2007) (“Interim Policy”). However, just as in *Bare*, — N.C. App. —, 677 S.E.2d 518, those issues regarding the execution of SBM have not been raised by either party in this case and our record contains no evidence, and certainly no findings by the trial court, as to the Interim Policy or details of SBM as applied to defendant. Defendant has challenged the constitutionality of the statute under which he was ordered to enroll in SBM, N.C. Gen. Stat. § 14-208.40B; defendant has not challenged the Interim Policy. Pursuant to our record, neither defendant nor the State mentioned the Interim Policy before the trial court or in their briefs. Although this Court may have the ability to take judicial notice of the Interim Policy, we have not had the benefit of briefing and arguments regarding the Interim Policy. For these reasons, we have addressed only the issues presented to us in this case, based upon the arguments and record presented in this case.

B. Void for Vagueness

[2] Defendant argues that the SBM statutory enrollment scheme is constitutionally void because it is too vague to be interpreted and administered uniformly. However, defendant did not raise a void for vagueness challenge to the trial court. “Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court.” *State v. Cumber*, 280 N.C. 127, 131-32, 185 S.E.2d 141, 144 (1971). Accordingly, we dismiss this argument.

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C. Lack of Notice and Opportunity to Be Heard

[3] Defendant argues that “the satellite-based monitoring statute is unconstitutional because it does not give an offender notice and an opportunity to be heard on whether he should be monitored.” Defendant further argues that the statute is unconstitutional because “under the ‘bring back’ statute . . . the offender [is not] entitled to be represented by counsel or to present evidence in his own defense.”

The State’s evidence that defendant was personally served with notice on 8 January 2008 was undisputed at the hearing. Service of notice was more than a month before defendant’s 19 February 2008 hearing; fifteen days is the minimum required notice under the statute. N.C. Gen. Stat. § 14-208.40B(b) (2007) (“The hearing shall be scheduled no sooner than 15 days from the date the notification is mailed.”). Furthermore, defendant was represented by counsel⁴ at the SBM hearing *sub judice*. Because defendant received timely notice of the hearing and was represented by an attorney at the SBM hearing, we need not address these arguments. *See* N.C. Gen. Stat. § 1-271 (2007) (allowing appeal only by an aggrieved party); *Culton v. Culton*, 327 N.C. 624, 625-26, 398 S.E.2d 323, 324-25 (1990) (citing N.C. Gen. Stat. § 1-271 as grounds for dismissing appeal when appellant had not been “directly and injuriously affected” by an order of the court).

[4] Defendant also argues that “[t]he monitoring statutes, G.S. § 14-208.40A and 40B, do not put an offender on notice of what facts will require him to be monitored. . . . Thus, an offender goes into the hearing with absolutely no idea of the basis upon which the decision to require monitoring will be made.” In support, defendant cites *State v. Battle*, 136 N.C. App. 781, 525 S.E.2d 850 (2000). *Battle* does not avail for defendant.

In *Battle*, “defendant attempted several times to make [a] motion to suppress[.]” 136 N.C. App. at 786, 525 S.E.2d at 853. However, the trial court “barely allowed defendant to state his motion and denied defendant any opportunity to state his grounds or present evidence in support of his motion.” *Id.* at 787, 525 S.E.2d at 854. Accordingly, this Court granted a new trial, holding that due process required the defendant be given “an opportunity to offer evidence and present his version of the” events in question. *Id.* at 786, 525 S.E.2d at 854.

4. Defendant sought to minimize this very obvious flaw in his argument by mentioning in a footnote that “[t]he fact that the defendant in this case did have counsel was serendipitous; counsel was already there to represent the defendant on the probation revocation.”

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This case is distinguishable from *Battle*, because defendant did not attempt to introduce any evidence at the SBM hearing. Even though the SBM enrollment statutory scheme expressly gives a defendant the right “to present to the court any evidence that the [State’s] evidence [pertaining to a defendant’s risk assessment] is not correct[.]” N.C. Gen. Stat. § 14-208.40A(a) (2007), defendant did not seek to refute the State’s evidence or attempt to offer any other evidence. It is well settled that a party who does not attempt to offer evidence for the trial court’s determination of its admissibility has no basis for appeal. *Kor Xiong v. Marks*, — N.C. App. —, —, 668 S.E.2d 594, 597 (2008). Accordingly, this argument is dismissed.

Though we dismiss this argument, we do note that a sex offender should have some idea of what evidence the DOC would introduce at an SBM hearing by referring to the statutes creating the SBM program. One of the SBM statutes requires “[t]he Department of Correction . . . [to] create guidelines to govern the [SBM] program.” N.C. Gen. Stat. § 14-208.40 (2007). A separate statute further requires that DOC regulations “shall be filed with and published by the office of the Attorney General and shall be made available by the Department for public inspection.” N.C. Gen. Stat. § 143B-261.1 (2007).

These DOC guidelines, created pursuant to N.C. Gen. Stat. § 14-208.40, are contained in the Interim Policy, which refers for example, to the Static-99 risk factors outlined in footnote 3 *supra*. The Interim Policy additionally refers to dynamic, or changeable, risk factors which “include, but are not limited to, substance abuse, poor family relations, access to victims, resistance to treatment, anger issues, residence instability, or antisocial personality.” N.C. Dep’t of Correction Policies-Procedures, No. VII.F Sex Offender Management Interim Policy 9 (2007). An offender may also be determined to be high risk based on factors which “override” the STATIC-99, including that the offender is “[c]linically diagnosed as a pedophile according to the DSM-IV[, in] [w]illful noncompliance with treatment[.]” or has been “[c]harged with a new sex offense.” *Id.* These are all examples of types of evidence which might be presented by the DOC at an SBM hearing.

V. Adequacy of Factual Support for the Conclusions of Law

[5] Defendant argues that the trial court’s two findings, the DOC’s “moderate” risk assessment and the ages of defendant and his victim at the time of the underlying offense do not adequately support the legal conclusion that defendant must enroll in SBM for seven to ten

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years. Defendant argues that “a DOC finding of ‘high risk’ is . . . a necessary prerequisite to monitoring.” Defendant further argues that because the DOC assessed him at moderate risk, the trial court had no factual basis for requiring the highest possible level of monitoring. The State argues that the trial court is not limited to the DOC risk assessment but “is duty-bound to consider all relevant evidence on the issue of whether Defendant is subject to SBM and requires the highest possible level of monitoring.”

The statutory text in question reads:

Upon receipt of a risk assessment from the Department, the court shall determine whether, based on the Department’s risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.

N.C. Gen. Stat. § 14-208.40B(c).

“Under the canons of statutory construction, the cardinal principle is to ensure accomplishment of the legislative intent. To that end, we must consider the language of the statute, the spirit of the act and what the act seeks to accomplish.” *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998) (citations, quotation marks and ellipses omitted), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671 (1999), *abrogated on other grounds by* *Lenox, Inc. v. Tolson*, 353 N.C. 659, 663-64, 548 S.E.2d 513, 516-17 (2001). “[W]e first look to the words chosen by the legislature and ‘if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings.’” *Fix v. City of Eden*, 175 N.C. App. 1, 19, 622 S.E.2d 647, 658 (2005) (quoting *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 896 (1998)). “[W]here the words of a statute are plain, direct and unambiguous, no interpretation is needed to ascertain their meaning.” *In re Duckett*, 271 N.C. 430, 436, 156 S.E.2d 838, 844 (1967) (quoting *Mook v. City of Lincoln*, 146 Neb. 779, [781,] 21 N.W.2d 743, [744 (1946)]).

The plain words of the statute *sub judice* that “the court shall determine whether, based on the Department’s risk assessment, the offender requires the highest possible level of supervision and monitoring[.]” N.C. Gen. Stat. § 14-208.40B(c), are not entirely “clear and

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unambiguous[,]" *Fix* at 19, 622 S.E.2d at 658. As noted in *Kilby*, "N.C. Gen. Stat. § 14-208.40B provides no specific legal principles which define when 'the highest possible level of supervision and monitoring' must be required." — N.C. App. —, —, 679 S.E.2d 430, 432. In addition, "[t]he 'highest possible level of supervision and monitoring' simply refers to SBM, as the statute provides only for SBM and does not provide for any lesser levels or forms of supervision or monitoring of a sex offender. If SBM is imposed, the only remaining variable to be determined by the court is the duration of the SBM." *Id.* — at — n.2, 679 S.E.2d at 432 n.2. Therefore, we must construe the statute according to well established principles of statutory construction.

"When the plain language of a statute proves unrevealing, a court may look to other indicia of legislative will, including: the purposes appearing from the statute taken as a whole, . . . the end to be accomplished, . . . and other like means." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) (citation, quotation marks and brackets omitted). This Court also "look[s] . . . to our prior interpretations of the [entire] statutory framework." *Fix* at 19, 622 S.E.2d at 658.

To interpret the statute and determine the evidence which could be admitted in an SBM proceeding, we begin with the clear legislative purpose of the SBM statutory scheme, which is "to supervise certain offenders whom the legislature has identified as posing a particular risk to society." *Bare*, — N.C. App. at —, 677 S.E.2d at 530. Therefore any proffered and otherwise admissible evidence relevant to the risk posed by a defendant should be heard by the trial court; the trial court is not limited to the DOC's risk assessment. *See* N.C. Gen. Stat. § 8C-1, Rule 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules.")

If the General Assembly had meant for the DOC's assessment of "high risk" to be a necessary prerequisite to the trial court's SBM determination, it could have said so, but instead, it places override authority with the trial court with the words "[i]f the trial court determines" N.C. Gen. Stat. § 14-208.40B(c). Furthermore, such a broad grant of power to the DOC, to alone determine if the offender requires "the highest possible level of supervision and monitoring" would have been an unconstitutional delegation of legislative authority by the General Assembly. *See Harvell v. Scheidt, Comr. of Motor Vehicles*, 249 N.C. 699, 702, 107 S.E.2d 549, 551 (1959) (holding that

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legislative grant of authority to the Department of Motor Vehicles to define the meaning of “habitual violator” and to suspend the driver’s license of a “habitual violator of the traffic laws” without a preliminary hearing was an unconstitutional delegation of legislative authority); *State v. Harris*, 216 N.C. 746, 754, 6 S.E.2d 854, 860 (1940) (declaring unconstitutional on the grounds of improper delegation of legislative responsibilities a statute granting an administrative agency unlimited discretion to set licensing requirements for dry cleaners). Construing the risk assessment provision of the SBM statutes as a constitutionally infirm delegation of legislative authority would violate the principle that “[t]his Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality.” *Guilford Co. Bd. of Education v. Guilford Co. Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993). Accordingly, we decline to adopt defendant’s proposed construction of the statute that would requires a DOC rating of high risk as a necessary prerequisite to SBM.

Even though we do not agree with defendant’s construction of the statute, our review requires us to consider whether evidence was presented which could support findings of fact leading to a conclusion that “the defendant requires the highest possible level of supervision and monitoring.” N.C. Gen. Stat. § 14-208.40B(c). If “the State presented no evidence which would tend to support a determination of a higher level of risk than the “moderate” rating assigned by the DOC[.]” then the order requiring defendant to enroll in SBM should be reversed. *Kilby*, — N.C. App. at —, 679 S.E.2d at 434. However, if evidence supporting the trial court’s determination of a higher level of risk is “presented, it [is] . . . proper to remand this case to the trial court to consider the evidence and make additional findings[.]” *Id.*

This case is distinguishable from our recent decision in *Kilby* where we reversed the SBM enrollment order when “the State presented *no evidence* which . . . tend[ed] to support a determination of a higher level of risk than the ‘moderate’ rating assigned by the DOC.” *Id.* (emphasis added). In fact, all of the evidence in *Kilby* presented alongside the DOC’s risk assessment indicated that the “defendant was fully cooperating with his post release supervision, which might support a finding of a lower risk level, but not a higher one.” *Id.* Accordingly, *Kilby* reasoned that “[t]he findings of fact [were] insufficient to support the trial court’s conclusion that ‘defendant requires the highest possible level of supervision and monitoring’ based upon a ‘moderate’ risk assessment from the DOC” and reversed. *Id.*

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In contrast, in the case *sub judice*, in the probation revocation hearing which immediately preceded the SBM hearing, defendant admitted that he inexcusably failed to attend at least seven sessions of a sexual abuse treatment program required as a condition of his probation. This is evidence which could support a finding of higher risk. See *McKune v. Lile*, 536 U.S. 24, 33, 153 L. Ed. 2d 47, 57 (2002) (noting that an untreated sex offender is significantly more likely to reoffend than if treated). While we appreciate the difference between the probation revocation hearing and the SBM hearing, we cannot ignore the fact that less than two hours before ordering defendant to enroll in SBM the trial court had relevant and persuasive evidence before it as to defendant's risk to the public; this evidence is also a part of the record before this court. Accordingly, we remand to the trial court for additional evidentiary proceedings and more thorough findings of fact as to the level of defendant's risk.

VI. Unspecified Time for Monitoring

[6] Defendant also argues that the trial court erred by ordering him to enroll in SBM for an indefinite period of time, seven to ten years. Defendant argues that “[i]t is not clear whether the defendant is subject to ten years of monitoring, which could somehow be reduced to seven, or is subject to seven years of monitoring, which DOC could somehow lengthen to ten.” This appears to be an issue of first impression for this Court.

The plain language of the applicable statute leaves the determination of a defendant's enrollment in SBM “to be *specified* by the court.” N.C. Gen. Stat. § 14-208.40B(c) (emphasis added). However, we find no statute or regulation which provides for any procedure for defendant to seek termination of his monitoring after seven years, but prior to ten years. Pursuant to N.C. Gen. Stat. § 14-208.43, offenders who are required to enroll in lifetime SBM under N.C. Gen. Stat. § 14-208.40(a)(1) may file a request with the Post-Release Supervision and Parole Commission requesting termination of SBM under certain conditions, but there is no statutory provision for termination of SBM of offenders, like defendant herein, who are enrolled under N.C. Gen. Stat. § 14-208.40(a)(2).⁵ In the absence of any statutory provisions to determine when an offender's monitoring would end if his “period of time” is a range of time, we conclude that N.C. Gen. Stat.

5. N.C. Gen. Stat. § 14-208.43(e) states that “The Commission shall not consider any request to terminate a monitoring requirement except as provided by this section. The Commission has no authority to consider or terminate a monitoring requirement for an offender described in G.S. 14-208.40(a)(2).” N.C. Gen. Stat. § 14-208.43(e) (2007).

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§ 14-208.40B(c) requires the trial court to set a definite time period for defendant's enrollment in SBM. We therefore remand to the trial court with the direction that if the trial court determines pursuant to Part V *supra*, that defendant "requires the highest possible level of supervision and monitoring" per N.C. Gen. Stat. § 14-208.40B(c), the trial court shall also set a definite period of time for defendant to be enrolled in SBM.

VII. Conclusion

We remand the trial court order requiring defendant to enroll in SBM for further findings of fact regarding whether defendant "requires the highest possible level of supervision and monitoring[,] and if so, for the trial court to determine a definite time period for which defendant should be required to enroll in SBM.

Remanded.

Judge CALABRIA concurs.

Judge ELMORE concurs in part and dissents in part in a separate opinion.

ELMORE, Judge, concurring in part and dissenting in part.

I would reverse the order enrolling defendant in the satellite-based monitoring (SBM) program because I believe that it constitutes an unconstitutional *ex post facto* punishment and, for the following reasons, I respectfully dissent from those parts of the majority opinion holding that, or based upon a holding that, SBM does not violate the *ex post facto* clause. However, I concur in the majority's conclusions in parts IV.B, IV.C, and VI.

Although I recognize and acknowledge that this Court addressed whether SBM violates the *ex post facto* clause several months ago in *State v. Bare*, I believe that we have the benefit of additional Department of Correction (DOC) rules and regulations in this case, which makes defendant's case distinguishable from Mr. Bare's. In *Bare*, we explained repeatedly that our conclusions were based upon the record before us and that the record could not support a contrary finding. *See, e.g., — N.C. App., —, —, 67 S.E.2d 518, 528 (2009)*. I believe that the record before us now can and should support a contrary finding.

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Here, we may augment the record on appeal by taking judicial notice of the DOC's "Sex Offender Management Interim Policy" (Interim Policy). "The device of judicial notice is available to an appellate court as well as a trial court[.] This Court has recognized in the past that important public documents will be judicially noticed. *Utilities Comm. v. Southern Bell Telephone Company*, 289 N.C. 286, 288, 221 S.E.2d 322, 323 (1976) (quotations and citations omitted); *see also State v. R.R.*, 141 N.C. 846, 855, 54 S.E. 294, 297 (1906) ("Rules and regulations of one of the departments established in accordance with a statute have the force of law, and the courts take judicial notice of them[.]") (quotations and citations omitted). N.C. Gen. Stat. § 14-208.40 states that the DOC "shall create guidelines to govern the program," which "shall be designed to monitor two categories of offenders" and requires "that any offender who is enrolled in the satellite-based program submit to an active continuous satellite-based monitoring program, unless an active program will not work" N.C. Gen. Stat. § 14-208.40(a)-(b) (2007). There are no published regulations detailing the SBM guidelines because the DOC is exempt from the uniform system of administrative rulemaking set out in Article 2A of the Administrative Procedures Act "with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees." N.C. Gen. Stat. § 150B-1(d)(6) (2007).⁶ Instead, the DOC "shall adopt rules and regulations related to the conduct, supervision, rights and privileges of persons. . . . Such rules and regulations shall be filed with and published by the office of the Attorney General and shall be made available by the Department for public inspection." N.C. Gen. Stat. § 143B-261.1 (2007). The 2007 interim policy is such a rule or regulation and it is the sort of public document of which this Court may take judicial notice. *See Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 337, 341-42, 88 S.E.2d 333, 337, 340 (1955) (taking judicial notice of the North Carolina Building Code even though "the briefs of the parties make no reference to" it because its creation and adoption was required by statute and thus had the "force and effect of law"); *W. R. Company v. Property Tax Comm.*, 48 N.C. App. 245, 261, 269 S.E.2d 636, 645 (1980) (stating that we may take judicial notice of a corporate charter on file with the Secretary of State but not included by either party in the record on appeal); *Byrd v. Wilkins*, 69 N.C. App. 516, 518-19, 317 S.E.2d 108, 109 (1984) (taking

6. From the existence of the Interim Policy, I assume, without articulating a legal opinion on the matter, that the DOC treats offenders subject to satellite-based monitoring as persons "under its supervision."

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judicial notice of a Commission for Health Services “regulation on the procedure to be followed in administering breathalyzer tests”); *see also Wells v. Consolidated Jud’l Ret. Sys. of N.C.*, 354 N.C. 313, 319-20, 553 S.E.2d 877, 881 (2001) (“When the legislature chooses not to amend a statutory provision that has been interpreted in a specific way, we assume it is satisfied with the administrative interpretation.”). Our opinions in *Bare* and its progeny make no mention of the DOC’s Interim Policy and, thus, in my opinion, the application of the Interim Policy is unique to defendant’s appeal.

A. Ex Post Facto Punishment

I respectfully disagree with the majority’s conclusion that SBM has no punitive purpose or effect and thus does not violate the *ex post facto* clause. To determine whether a statute is penal or regulatory in character, a court examines the following seven factors, known as the *Mendoza-Martinez* factors:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned[.]

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 661 (1963) (footnotes and citations omitted). Although these factors “may often point in different directions[, a]bsent conclusive evidence of [legislative] intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.” *Id.* at 169, 9 L. Ed. 2d at 661. Because I believe that *Bare* is determinative as to the question of whether there is conclusive evidence that the legislature intended the SBM statute to be penal, I begin my analysis by examining the seven *Mendoza-Martinez* factors.

1. Affirmative disability or restraint. The first question is “[w]hether the sanction involves an affirmative disability or restraint.” *Mendoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 661 (footnote and citations omitted). To echo the Supreme Court of Indiana, “[t]he short answer is that the Act imposes significant affirmative obligations and a severe stigma on every person to whom

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it applies.” *Wallace v. Indiana*, 905 N.E.2d 371, 661 (Ind. 2009). Both the SBM statutory provisions and its implementing guidelines require affirmative and intrusive post-discharge conduct under threat of prosecution.

In addition to the regular sex offender registration program requirements, which, though judicially determined to be non-punitive, are nevertheless significant in practice, SBM participants are subject to the following additional affirmative disabilities or restraints: (1) The DOC has “the authority to have contact with the offender at the offender’s residence or to require the offender to appear at a specific location as needed[.]” N.C. Gen. Stat. § 14-208.42 (2007). (2) “The offender *shall* cooperate with the [DOC] and the requirements of the satellite-based monitoring program[.]” *Id.* (emphasis added). (3) An offender cannot leave the state of North Carolina. *Sex Offender Management Interim Policy* 16 (effective 1 January 2007). (4) An offender is subject to unannounced warrantless searches of his residence every ninety days. *Id.* at 12. (5) An offender must maintain a daily schedule and curfew as established by his DOC case manager. An offender’s schedule and curfew includes spending at least six hours each day at his residence in order to charge his portable tracking device. *Id.* at 15. (6) “If the offender has an active religious affiliation,” the offender’s case manager must “notify church officials of the offender’s criminal history and supervision conditions[.]” *Id.* at 12.

Clearly, the SBM program imposes affirmative and intrusive post-discharge conduct upon an offender long after he has completed his sentence, his parole, his probation, and his regular post-release supervision; these restraints continue forever. Of particular note is the prohibition against leaving the state. As the U.S. Supreme Court has repeated,

The word “travel” is not found in the text of the Constitution. Yet the constitutional right to travel from one State to another is firmly embedded in our jurisprudence. Indeed, as Justice Stewart reminded us in *Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), the right is so important that it is “assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.” *Id.*, at 643 (concurring opinion).

Saenz v. Roe, 526 U.S. 489, 498, 143 L. Ed. 2d 689, 701 (1999) (additional quotations and citations omitted). The government may only

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interfere with a citizen's right to interstate travel if it can show that such interference "is necessary to promote a compelling governmental interest[.]" *Id.* at 499, 143 L. Ed. 2d at 702 (quotations and citation omitted). Otherwise, the government risks violating the Equal Protection clause. *Id.* Depriving an offender of his right to interstate travel is, without question, an affirmative disability or restraint.

Though some may argue that the remaining restrictions are mere inconveniences, this would be a deceiving understatement. Although offenders are no longer subject to formal probation, the requirements that they are subject to are equally intrusive: they cannot leave the state, they cannot spend nights away from their homes, they are subject to schedules and curfews, they must appear on command, and they must submit to all DOC requests and warrantless searches. An offender's freedom is as restricted by the SBM requirements as by the regular conditions of probation, which include: remaining in the jurisdiction unless the court or a probation officer grants written permission to leave, reporting to a probation officer as directed, permitting the probation officer to visit at reasonable times, answering all reasonable inquiries by the probation officer, and notifying the probation officer of any change in address or employment. In addition, submission to warrantless searches is not a regular condition of probation and is instead a special condition of probation.

Accordingly, I believe that SBM imposes an affirmative disability or restraint upon defendant, which weighs in favor of the SBM statute being punitive rather than regulatory.

2. Sanctions that have historically been considered punishment. The next question is whether SBM "has historically been regarded as a punishment." *Mendoza v. Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 661 (footnote and citations omitted). Obviously, satellite monitoring technology is new and thus tracking offenders using the technology is not a historical or traditional punishment. However, the additional restrictions imposed upon offenders are considered punishments, both historical and current. In addition, some courts have suggested that the SBM units, made up of an ankle bracelet and a miniature tracking device (MTD), are analogous to the historical punishments of shaming. *See, e.g., Doe v. Bredeson*, 507 F.3d 998, 110 (2007) (Keith, J., concurring in part and dissenting in part), *cert. denied*, 172 L. Ed. 2d 210 (2008).

In *Bredeson*, the Sixth Circuit considered whether Tennessee's SBM statute violated the *ex post facto* clause. The *Bredeson* majority first held that the Tennessee legislature's purpose when enacting the

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SBM statute was to establish a civil, nonpunitive regime. *Id.* at 1004. The majority then examined the *Mendoza-Martinez* factors and concluded, in relevant part, that Tennessee's SBM program was not a sanction historically regarded as punishment. *Id.* at 1005. It explained that the Tennessee "Registration and Monitoring Acts do not increase the length of incarceration for covered sex offenders, nor do they prevent them from changing jobs or residences or traveling to the extent otherwise permitted by their conditions of parole or probation." *Id.* Judge Keith, in his dissent, characterized the GPS monitoring system as a "catalyst for ridicule" because the defendant's monitoring device was "visible to the public when worn" and had to "be worn everywhere" the defendant went. *Id.* at 1010 (Keith, J., dissenting in part and concurring in part). "Public shaming, humiliation, and banishment are well-recognized historical forms of punishments." *Id.* (citations omitted). It is clear from the DOC guidelines and maintenance agreements that the MTD must be worn on the outside of all clothing and cannot be concealed or camouflaged in any way, even though some forms of concealment or camouflage would not interfere with the LTD's function. In addition, an offender's religious institution must be informed of his status and his SBM compliance requirements. I agree with Judge Keith that the SBM scheme is reminiscent of historical shaming punishments, which weighs in favor of finding the scheme punitive, rather than regulatory.

3. Finding of scienter. The next question is whether the statute "comes into play only on a finding of *scienter*." *Mendoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 661 (footnote and citations omitted). I believe that this factor is met because the underlying criminal acts, indecent liberties with a child and third degree sexual exploitation of a minor, require intentional conduct. *State v. Beckham*, 148 N.C. App. 282, 286 558 S.E.2d 255, 258 (2002) (citation omitted); see N.C. Gen. Stat. § 14-202.1(a) (2007) ("A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either: (1) *Willfully* takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or (2) *Willfully* commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.") (emphases added); N.C. Gen. Stat. § 14-190.17(a) (2007) ("A person commits the offense of third degree sexual exploitation of a minor if, *knowing* the character or content of the material, he possesses material that contains

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a visual representation of a minor engaging in sexual activity.”) (emphasis added).

4. Traditional aims of punishment. The next question is “whether the sanction promotes the ‘traditional aims of punishment—retribution and deterrence.’” *Beckham*, 148 N.C. App. at 286, 558 S.E.2d at 258 (quoting *Mendoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 661). Without question, the sanction promotes deterrence. For example, offenders are restricted in their movements, ostensibly in part to prevent them from venturing into schoolyards or nurseries; when satellite-monitored offenders venture into these restricted zones, their supervisors are notified and the offender may be charged with a felony. Although “the mere presence of a [deterrent quality] is insufficient to render a sanction criminal [because] deterrence may serve civil, as well as criminal goals,” *Hudson v. United States*, 522 U.S. 93, 105, 139 L. Ed. 2d 450, 463 (1997) (quotations and citation omitted), the deterrent effect here is substantial and not merely incidental. Accordingly, it weighs in favor of finding the sanction to be punitive.

5. Applicability only to criminal behavior. The next question is “whether the behavior to which [the] statute applies is already a crime.” *Mendoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 567 (footnote and citation omitted). The SBM statute applies only to people who have been convicted of “reportable offenses.” Thus, this factor weighs in favor of finding the sanction to be punitive.

6. Advancing non-punitive interest. The next question is “whether an alternative purpose to which [the statute] may rationally be connected is assignable for it[.]” *Id.* at 168-69, 9 L. Ed. 2d at 567 (footnote and citation omitted). The SBM statute does advance a rationally related non-punitive interest, which is to keep law enforcement officers informed of certain offenders’ whereabouts in order to protect the public. Preventing further victimization by recidivists is a worthy non-punitive interest and one that weighs in favor of finding the sanction to be regulatory.

7. Excessiveness in relation to State’s articulated purpose. The final question is “whether [the statute] appears excessive in relation to the alternative purpose assigned” to it. *Id.* at 169, 9 L. Ed. 2d at 568 (footnote and citation omitted). “The excessiveness inquiry . . . is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means

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chosen are reasonable in light of the nonpunitive objective.” *Smith v. Doe*, 538 U.S. at 105, 155 L. Ed. 2d at 185. Judge Keith, dissenting from the majority opinion in *Bredeson*, explained SBM’s excessiveness as follows:

I fail to see how putting all persons in public places on alert as to the presence of offenders, like Doe, helps law enforcement officers geographically link offenders to new crimes or release them from ongoing investigations. It equally eludes me as to how the satellite-based monitoring program prevents offenders, like Doe, from committing a new crime. Although the device is obvious, it cannot physically prevent an offender from re-offending. Granted, it may help law enforcement officers track the offender (after the crime has already been committed), but it does not serve the intended purpose of public safety because neither the device, nor the monitoring, serve as actual preventative measures. Likewise, it is puzzling how the regulatory means of requiring the wearing of this plainly visible device fosters rehabilitation. To the contrary, and as the reflection above denotes, a public sighting of the modern day “scarlet letter”—the relatively large G.P.S. device—will undoubtedly cause panic, assaults, harassment, and humiliation. Of course, a state may improve the methods it uses to promote public safety and prevent sexual offenses, but requiring Doe to wear a visible device for the purpose of the satellite-based monitoring program is not a regulatory means that is reasonable with respect to its non-punitive purpose.

Sexual offenses unquestionably rank amongst the most despicable crimes, and the government should take measures to protect the public and stop sexual offenders from re-offending. However, to allow the placement of a large, plainly obvious G.P.S. monitoring device on Doe that monitors his every move, is dangerously close to having a law enforcement officer openly escorting him to every place he chooses to visit for all (the general public) to see, but without the ability to prevent him from re-offending. As this is clearly excessive, this factor weighs in favor of finding the Surveillance Act’s satellite-based monitoring program punitive.

Bredeson, 507 F.3d at 1012 (Keith, J., dissenting). I agree with Judge Keith’s assessment; the restrictions imposed upon defendant by the SBM statute are dangerously close to supervised probation if not personal accompaniment by a DOC officer. The *Bredeson* majority dismissed Justice Keith’s concerns about the device’s visibility by stating

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its “belie[f] that the dimensions of the system, while not presently conspicuous, will only become smaller and less cumbersome as technology progresses.” *Id.* at 1005. Smaller, less conspicuous, and less cumbersome technologies already exist, but implementation of new technologies is expensive and time-consuming. Though we may one day be able to tag and release a recidivist sex offender as though he were a migrating songbird, it is not a practical reality for defendant at this time or in the immediate future. The SBM equipment and accompanying restrictions as they *exist now* support a conclusion that SBM is a punishment.

In sum, of the seven factors specifically identified by the U.S. Supreme Court in *Mendoza-Martinez* as relevant to the inquiry of whether a statute has a punitive effect despite legislative intent to the contrary, I believe that six factors point in favor of treating the SBM provisions as punitive. Only one—that the statute advances a non-punitive purpose—points in favor of treating the SBM provisions as non-punitive. Accordingly, I would hold that defendant’s enrollment in the SBM program constitutes a punishment.

Accordingly, I would also hold that defendant’s enrollment in the SBM program constitutes an unconstitutional *ex post facto* punishment and would reverse the order enrolling him in the program.

KATHERINE HANNA EVERHART, PLAINTIFF v. O'CHARLEY'S INC., DEFENDANT

No. COA08-1454

(Filed 6 October 2009)

1. Evidence— punitive damages—evidence of prior lawsuit—opened door

The trial court did not err during the punitive damages phase of a negligence trial by admitting evidence of prior allegations that a customer had been served bleach in another of defendant’s restaurants. Defendant “opened the door” to such evidence.

2. Damages and Remedies— punitive damages—motion for judgment notwithstanding the verdict (JNOV)

The trial court did not err in a negligence and breach of implied warranty of merchantability case arising from a restau-

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rant serving a customer cleaning solution by denying defendant's motion for (JNOV) on the issue of punitive damages. The evidence was sufficient to permit the jury to reasonably conclude that an employee's insistence on following company policy and completing a report before determining what plaintiff had ingested and the appropriate first aid was related to plaintiff's injuries. Plaintiff's testimony was competent to address whether her emotional injuries were related to the willful and wanton conduct.

3. Damages and Remedies— punitive damages—motion for new trial

The trial court did not err by denying defendant's motion for a new trial because the facts support the jury's punitive damages award in light of the factors set out in N.C.G.S. § 1D-35(2) and in *BMW*, 517 U.S. 559 (1996).

Appeal by defendant from judgment entered 15 April 2008 and order entered 3 June 2008 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 23 April 2009.

Morrow Alexander Porter & Whitley, PLLC, by John Carl Vermitsky, for plaintiff-appellee.

Robinson, Bradshaw & Hinson, P.A., by D. Blaine Sanders and Andrew W. J. Tarr, for defendant-appellant.

GEER, Judge.

Defendant O'Charley's Inc. appeals from a judgment entered following a bifurcated trial in which plaintiff Katherine Hanna Everhart was awarded \$10,000.00 in compensatory damages in the first phase of the trial and \$350,000.00 in punitive damages in the second phase. The trial court subsequently reduced the punitive damages award to \$250,000.00. On appeal, O'Charley's only challenges the punitive damages award, arguing that the trial court erred in denying its motion for judgment notwithstanding the verdict ("JNOV") and its motion for a new trial as to the punitive damages phase. The primary contention of O'Charley's is that its JNOV motion should have been granted for insufficient evidence that Ms. Everhart's injuries were related to willful or wanton conduct attributable to O'Charley's. Because our review of the record reveals ample evidence to support the jury's verdict, and we find O'Charley's' remaining arguments unpersuasive, we uphold the punitive damages award.

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Facts

On 9 September 2006, Ms. Everhart went shopping with her husband and two sons at Hanes Mall in Winston-Salem, North Carolina. After finishing their shopping, the family went to an O'Charley's restaurant near the mall for dinner. Ms. Everhart requested water, immediately drank the entire glass, and asked for a refill. The Everharts' server, Dathan Jones, went to get a water pitcher, but accidentally grabbed a pitcher that had been used to soak soda nozzles in a cleaning solution called Auto-Chlor System Solution-QA Sanitizer ("Auto-Chlor"). As a result, he refilled Ms. Everhart's glass with a mixture of water and Auto-Chlor.

Ms. Everhart took several sips through her straw and immediately noticed an unfamiliar taste and a chemical smell. Although she swallowed some of the liquid, she spit out the rest. Some drops landed on her shirt and immediately began discoloring it. Mr. Everhart asked his wife what was wrong, and she responded: "I've been poisoned." At this point, Mr. Jones came back to the table, grabbed the glass, and left. Ms. Everhart told her husband that she felt sick, "like [she was] going to throw up," and went to the bathroom to try to make herself throw up.

While Ms. Everhart was in the bathroom, Assistant Dining Room Manager Byron Witherspoon came to the table and introduced himself as the manager on duty at O'Charley's. Mr. Everhart told Mr. Witherspoon that "his wife had drunk an unknown substance and she had gotten sick and ran into the restroom." Mr. Witherspoon then left the table, got a "Customer Accident/Incident Report" form from the restaurant office, and went back to the table to obtain information from Mr. Everhart about the incident. While Mr. Witherspoon was asking Mr. Everhart the questions on the incident report form, Mr. Everhart repeatedly asked him, "What was in the pitcher?" Mr. Everhart explained to Mr. Witherspoon that he was taking Ms. Everhart to the emergency room and needed to know what Ms. Everhart had swallowed. Mr. Witherspoon did not answer Mr. Everhart's questions, but instead responded by simply asking the next question on the incident report form.

The container of Auto-Chlor was kept above a sink in the restaurant's kitchen area. Its first aid label stated that if someone swallowed the solution, poison control or a doctor should be called immediately. It also warned that if the solution was ingested, the person *should not* try to induce vomiting unless directed to do so by poison

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control or a doctor. According to the label, the person should instead try to sip a glass of water if the person was able to swallow.

After attempting to induce vomiting for roughly five minutes in the bathroom, Ms. Everhart returned to the table where Mr. Witherspoon was still attempting to complete the incident report form by questioning Mr. Everhart. Ms. Everhart was “visibly crying, shaking and extremely upset.” Mr. Jones then returned to the table and apologized to Ms. Everhart. Mr. Witherspoon did not, however, ask Mr. Jones any questions about what the substance was that was in Ms. Everhart’s glass. In addition, at no time while the Everharts were still at the restaurant did Mr. Witherspoon look for the Auto-Chlor’s warning label to give the Everharts the first aid instructions.

The Everharts left O’Charley’s to go to Forsyth Medical Center’s emergency room. Ms. Everhart testified that on the drive there, she was “distraught” and “petrified” by the fear of not knowing what she had ingested. When she arrived at the hospital, she was unable to tell the medical staff what she drank, but she said she thought it might have been bleach. The doctor treating Ms. Everhart had to call O’Charley’s to find out what was in the glass.

Ms. Everhart was discharged after being treated. Beginning the next day and continuing for roughly a week, Ms. Everhart had sores on her lips and in her mouth, had a sore throat, and felt nauseous. Ms. Everhart also experienced painful heartburn, indigestion, and reflux. Two months afterward, Ms. Everhart underwent an endoscopy, which indicated that Ms. Everhart’s esophagus, stomach, and duodenum were normal.

Ms. Everhart filed suit against O’Charley’s on 12 March 2007, asserting claims for negligence and breach of the implied warranty of merchantability and seeking both compensatory and punitive damages. After the trial court denied O’Charley’s’ motion for summary judgment, O’Charley’s moved pursuant to N.C. Gen. Stat. § 1D-30 (2007) for a bifurcated trial on the issues of compensatory and punitive damages.

Following the compensatory damages phase of the trial, the jury awarded Ms. Everhart \$10,000.00. During the punitive damages phase, the trial court denied O’Charley’s’ motion for a directed verdict at the close of all the evidence. The jury subsequently awarded Ms. Everhart \$350,000.00 in punitive damages. The trial court entered judgment on the verdicts on 15 April 2008, but reduced the amount of

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the punitive damages award to \$250,000.00 pursuant to N.C. Gen. Stat. § 1D-25(b) (2007). On 17 April 2008, O'Charley's moved for JNOV, or, alternatively, for a new trial, with both motions only addressing the punitive damages award. In an order entered 3 June 2008, the trial court denied the motions and upheld the punitive damages award. O'Charley's timely appealed to this Court.

I

[1] O'Charley's contends that the trial court erred during the punitive damages phase of the trial by admitting evidence about allegations in a 2004 Florida lawsuit that a customer had been served bleach in another O'Charley's restaurant. Prior to trial, O'Charley's filed a motion *in limine* to exclude any evidence regarding the Florida lawsuit on the grounds of hearsay, relevance, improper purpose, and unfair prejudice. After considering arguments from counsel, the trial court granted the motion and excluded the evidence.

During the cross-examination of Kevin Alexander, a regional operations director with O'Charley's who was called as an adverse witness by Ms. Everhart, defense counsel asked about the incident report form completed in this case:

Q. After this incident, was it reported to other stores?

A. Yes.

Q. Why was that?

A. I reported it to all of my stores, the incident that had happened, reminded everyone that following the procedures on breaking down the stations, on how we store things. And I again spoke to my boss about it. The following Monday on his conference call he had me to relate what I knew at the time about it to the other operations directors so that it could be—you know, they could talk to their own restaurants about it.

At this point, Ms. Everhart's counsel asked to be heard outside the presence of the jury and argued:

[Defense counsel] just opened the door wide open for me to inquire as to why they inquired with any other restaurants as to this previous incident and gave them any notice of it for future conduct. It's not fair that they get to say, "After this happened I told every other store so this won't happen again," and I can't say, "Well, the first time it happened, you didn't tell anyone."

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The trial court ruled that “[t]he jury gets to consider similar past conduct” and allowed Ms. Everhart’s counsel to ask Mr. Alexander on redirect, over O’Charley’s objection, “Mr. Alexander, are you aware of the existence of any similar past conduct of the nature of this lawsuit by O’Charley’s in 2002 in Florida?” Mr. Alexander responded that he “became aware of an allegation today . . . I just found out today that there was an allegation of bleach.”

O’Charley’s first claims that the evidence is inadmissible because Mr. Alexander did not know about the allegations prior to being questioned, and, therefore, could not testify from personal knowledge as required by Rule 602 of the Rules of Evidence. O’Charley’s did not, however, assert Rule 602 as a basis for its objection to the question asked Mr. Alexander. Its objection on other bases—hearsay, relevance, and unfair prejudice—were not sufficient to preserve an appeal based on Rule 602. A party may not assert at trial one basis for objection to the admission of evidence, but then rely upon a different basis on appeal. *See State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (“[Appellant] may not swap horses after trial in order to obtain a thoroughbred upon appeal.”).

While O’Charley’s did rely in part upon Rule 602 in its motion *in limine* that was granted by the trial court, in order to preserve the issue for appeal, it was required to repeat its objections at trial when the evidence was actually offered. *See State v. Tutt*, 171 N.C. App. 518, 520, 615 S.E.2d 688, 690 (2005) (“Rulings on motions *in limine* are preliminary in nature and subject to change at trial, depending on the evidence offered, and thus an objection to an order granting or denying the motion is insufficient to preserve for appeal the question of the admissibility of the evidence.” (internal quotation marks omitted)). We, therefore, do not consider this argument on appeal.

O’Charley’s next contends that the evidence of the Florida allegations was inadmissible hearsay. As Ms. Everhart’s counsel argued, however, defense counsel “opened the door” for Ms. Everhart’s counsel to question Mr. Alexander about the Florida case.

It is well established that “where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially.” *State v. Sexton*, 336 N.C. 321, 360, 444 S.E.2d 879, 901, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429, 115 S. Ct. 525 (1994). Further, “evidence which would otherwise be inadmissible may be permissible

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on cross-examination to correct inaccuracies or misleading omissions in the [party]'s testimony or to dispel favorable inferences arising therefrom." *State v. Braxton*, 352 N.C. 158, 193, 531 S.E.2d 428, 448 (2000) (internal quotation marks omitted), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797, 121 S. Ct. 890 (2001). *Accord State v. Johnston*, 344 N.C. 596, 608, 476 S.E.2d 289, 296 (1996) (holding that "the introduction of evidence to dispel favorable inferences arising from [the] cross-examination of a witness" is permissible even if the evidence would otherwise constitute hearsay); *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993) (observing that when party "opens the door" to issue, opposing party may elicit evidence that would otherwise be incompetent or irrelevant to "dispel favorable inferences arising" from party's evidence).

The testimony elicited by O'Charley's' counsel when questioning Mr. Alexander would have permitted the jury to draw the favorable inference that once O'Charley's had notice of an incident, it would take corrective measures to ensure that such an incident would not happen again, thus negating the need to impose punitive damages to deter further misconduct. Ms. Everhart was entitled to attempt to rebut this inference by showing that O'Charley's, when it received notice of similar allegations on a prior occasion, did not advise its regional operations directors of those allegations. *See Braxton*, 352 N.C. at 193-94, 531 S.E.2d at 449 (concluding State could cross-examine defendant regarding specifics of prior offenses where defendant's testimony attempted to minimize seriousness of crimes). The trial court, therefore, properly permitted the question.

O'Charley's also argues that the evidence should have been excluded under N.C.R. Evid. 403 as being unfairly prejudicial. Where, however, a party is responsible for "opening the door" with respect to certain evidence, that party may not complain of unfair prejudice resulting from its admission. *See State v. Wilson*, 151 N.C. App. 219, 226, 565 S.E.2d 223, 228 ("Because defendant opened the door to the testimony at issue, we need not address defendant's argument that the testimony was inadmissible because it was irrelevant or overly prejudicial."), *cert. denied*, 356 N.C. 313, 571 S.E.2d 215 (2002). This argument is, therefore, also overruled.

II

[2] O'Charley's next argues that the trial court erred in denying its motion for JNOV. "The standard of review of a ruling entered upon a motion for judgment notwithstanding the verdict is 'whether, upon

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examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury.’ ” *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 249-50, 565 S.E.2d 248, 252 (2002) (quoting *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000)), *disc. review denied*, 356 N.C. 667, 576 S.E.2d 330 (2003). A JNOV “motion should be denied if there is more than a scintilla of evidence supporting each element of the non-movant’s claim.” *Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998). A “ ‘scintilla of evidence’ ” is defined as “ ‘very slight evidence.’ ” *Scarborough v. Dillard’s Inc.*, 188 N.C. App. 430, 434, 655 S.E.2d 875, 878 (2008) (quoting *State v. Lawrence*, 196 N.C. 562, 582, 146 S.E. 395, 405 (1929)).

N.C. Gen. Stat. § 1D-15(a) (2007) establishes the standards for recovering punitive damages in North Carolina:

Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:

- (1) Fraud.
- (2) Malice.
- (3) Willful or wanton conduct.

The existence of the aggravating factor must be proven by clear and convincing evidence. N.C. Gen. Stat. § 1D-15(b).

In this case, the sole aggravating factor at issue at trial was willful or wanton conduct. N.C. Gen. Stat. § 1D-5(7) (2007) defines “[w]illful or wanton conduct” as “the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. ‘Willful or wanton conduct’ means more than gross negligence.”

O’Charley’s first challenges the sufficiency of the evidence of willful or wanton conduct. In arguing that Mr. Witherspoon’s conduct was not willful or wanton, however, O’Charley’s only points to the evidence favorable to its position. It ignores the evidence indicating that Mr. Witherspoon, consistent with O’Charley’s’ policy, willfully

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disregarded the possibility of injury to Ms. Everhart so that he could complete the incident report form.

Ms. Everhart presented evidence that after Ms. Everhart went into the restroom to try to induce vomiting and Mr. Witherspoon came to the Everharts' table to fill out the incident report form, Mr. Everhart repeatedly asked Mr. Witherspoon, "What was in the pitcher?" Mr. Witherspoon "just ignored his question and went on with his sheet of paper." Mr. Everhart testified that Mr. Witherspoon refused to look up from the form and continued to ask questions from the form despite Mr. Everhart's attempts to try to find out what was in Ms. Everhart's glass. Ms. Everhart's evidence showed that Mr. Witherspoon made no effort to identify what had been served Ms. Everhart even though he could have asked the server when he returned to the table.

The label on the Auto-Chlor, which was back in the restaurant's kitchen, contained a first aid warning stating: "IF SWALLOWED: Call poison control center or doctor immediately for treatment advice. Have person sip a glass of water if able to swallow. *Do not induce vomiting unless told to do so by a poison control center or doctor.* . . . NOTE TO PHYSICIAN: Probable mucosal damage may contraindicate the use of gastric lavage. Measures against circulatory shock, respiratory depression and convulsion may be needed." (Emphasis added.) It is undisputed that Mr. Witherspoon did not attempt to find the Auto-Chlor warning label to learn what its first aid instructions were.

Mr. Witherspoon testified that he did not answer Mr. Everhart's questions because he needed to collect "vital information" such as Ms. Everhart's age, marital status, and contact information for the incident report before investigating the nature of the substance Ms. Everhart had ingested. Mr. Witherspoon also acknowledged that although he knew Ms. Everhart was in the bathroom, he did not instruct anyone to go check on her because he needed to fill out the report form. Both Mr. Witherspoon and Kevin Alexander, one of O'Charley's' regional operations directors, testified that O'Charley's has a policy that the manager must complete the incident report form before doing anything else unless the customer is "convulsing, passed out on the floor," or "bleeding profusely." Mr. Witherspoon acted in accordance with the policy. Because, according to Mr. Witherspoon, Ms. Everhart did not look "overly sick" when she returned from the bathroom, Mr. Witherspoon continued to fill out the report form.

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Although the incident report form asks for biographical information, such as the name, address, telephone number, and employer of the injured person, the form does not include space for documenting the results of any investigation by O'Charley's personnel. The form states that it is to be "completed by O'Charley's, Inc. personnel in anticipation of litigation[.]" and asks, "Do you think a claim will be made?" It also asks for the contact information for potential "witnesses."

This evidence, viewed in the light most favorable to Ms. Everhart, shows that, although Mr. Witherspoon knew Ms. Everhart had ingested some unknown substance that had made her sick, he refused to find out what she had actually been served or the first aid protocol for that substance before completing O'Charley's' incident report form. Moreover, that form is not designed to provide assistance to the customer, but is focused on "anticipat[ing] . . . litigation." A jury could reasonably find from this evidence that Mr. Witherspoon chose to give preference to protecting O'Charley's from possible litigation over providing assistance to Ms. Everhart who had been served a possibly toxic substance. The jury could then further conclude that Mr. Witherspoon acted with conscious and intentional disregard of and indifference to Ms. Everhart's rights and safety, thus supporting a finding of willful or wanton conduct. *See Scarborough*, 188 N.C. App. at 435, 655 S.E.2d at 878-79 (holding there was sufficient evidence of "conscious and intentional disregard" of employee's rights where employer failed to fully investigate incident before charging employee with embezzlement). *See also Medeiros v. Randolph County Hosp. Ass'n*, 968 F. Supp. 1469, 1475 (M.D. Ala. 1997) (concluding evidence was sufficient to send punitive damages issue to jury under § 1983 where evidence showed that hospital "failed to provide even the most basic pre-termination" investigation and hearing prior to terminating doctor's medical privileges).

O'Charley's compares this case to *Faris v. SFX Entm't, Inc.*, 2006 U.S. Dist. LEXIS 89918, 2006 WL 3690632 (W.D.N.C. 2006) (unpublished), *Collins v. St. George Physical Therapy*, 141 N.C. App. 82, 539 S.E.2d 356 (2000), and *Butt v. Goforth Props., Inc.*, 95 N.C. App. 615, 383 S.E.2d 387 (1989), and contends that these cases "illustrate[] the type of conduct that fails to meet the willful or wanton threshold." In *Faris*, a concert attendee at an amphitheater was electrocuted in a stairwell when he accidentally came into contact with a broken light fixture while holding onto the handrail, thus completing the circuit with the stairwell. 2006 U.S. Dist. LEXIS 89918 at *4, 2006 WL 3690632

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at *1. One week earlier, two other people had reported being shocked at the same location from the same faulty light fixture. *Id.* at *4, 2006 WL 3690632 at *2. The district court concluded as a matter of law that the facility manager's conduct in failing to correct the condition was not willful and wanton, reasoning that: "a reading of the facts in a light most favorable to the plaintiff does not produce evidence that Lynch intentionally turned a blind eye to the danger: he looked, he saw, and he acted. Unfortunately, and possibly negligently, he looked in the wrong place, saw the wrong thing, and took ineffective action." *Id.* at *23-24, 2006 WL 3690632 at *7.

Here, the evidence would permit the jury to make the finding of an intentional blind eye to danger that was absent in *Faris*. Mr. Witherspoon did not "ineffective[ly]" attempt to help Ms. Everhart, but rather willfully avoided assisting her in order to complete O'Charley's' litigation form.

Mr. Witherspoon's deliberate disregard of Ms. Everhart's safety in favor of preparing for litigation similarly distinguishes this case from *Collins* and *Butt*. The evidence in those two cases showed, at best, that the defendant was seriously negligent and the plaintiff was harmed. Neither case had the evidence of willfulness produced in this case. *See Collins*, 141 N.C. App. at 86-88, 539 S.E.2d at 360-61 (holding there was insufficient evidence of willful or wanton conduct where physical therapist repaired weight machine without training and with improper parts, and plaintiff was injured when machine broke); *Butt*, 95 N.C. App. at 619, 383 S.E.2d at 389 ("In the case at bar, plaintiffs submitted affidavits which stated that defendants' employees were extremely careless and that they exercised poor judgment."). We, therefore, hold that Ms. Everhart presented sufficient evidence of willful and wanton conduct to send the punitive damages issue to the jury.

O'Charley's next contends that it cannot be held liable for punitive damages under N.C. Gen. Stat. § 1D-15(c). That statute provides that in order to award punitive damages against a corporation based on vicarious liability, "the officers, directors, or managers of the corporation [must have] participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." N.C. Gen. Stat. § 1D-15(c).

This is not, however, a case where O'Charley's' liability for punitive damages was based solely on vicarious liability. Mr. Witherspoon testified that in his interaction with the Everharts, he was simply fol-

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lowing O'Charley's' corporate policy of completing the incident report form before investigating the nature of the incident. O'Charley's' regional operations director confirmed that this was O'Charley's' policy. A corporation may be subject to punitive damages based on a theory of direct liability where the corporation's acts or policies constitute the aggravating factor. *See Schropp v. Crown Eurocars, Inc.*, 654 So.2d 1158, 1159-61 (Fla. 1995) (differentiating between punitive damages based on vicarious liability and direct liability of corporation for punitive damages).

O'Charley's argues that its policy does not amount to willful or wanton conduct. O'Charley's, however, cites no authority supportive of its position. Instead, O'Charley's claims that "there is nothing 'wicked' or 'needless' about preparing a report that memorializes the facts of an incident that may be the subject of litigation." This characterization of the O'Charley's policy fails to apply N.C. Gen. Stat. § 1D-5(7)'s definition of "willful or wanton conduct."

After describing its policy in the light most favorable to it—contrary to the proper standard of review—O'Charley's asserts that "[it] puts the safety of its guests before the legitimate need to memorialize the facts surrounding the incident." Mr. Witherspoon, however, testified that it was O'Charley's' corporate policy to complete the incident report form before investigating an incident unless the customer is "convulsing, passed out on the floor," or "bleeding profusely." A reasonable jury could disagree with O'Charley's' characterization of its policy and conclude to the contrary that this policy recklessly disregards customers' safety and well-being in order to begin the process of protecting O'Charley's against potential litigation.

In any event, we disagree with O'Charley's' contention, as to Mr. Witherspoon, that even if he did act willfully or wantonly, he does not fall within the category of employees—officers, directors, and managers—whose conduct may be imputed to O'Charley's for purposes of punitive damages. There is no suggestion that Mr. Witherspoon is an officer or director of O'Charley's; the issue under N.C. Gen. Stat. § 1D-15(c) is whether he is a manager. In the absence of a statutory definition, this Court has defined "[a] 'manager' [as] one who 'conducts, directs, or supervises something.'" *Miller v. B.H.B. Enters., Inc.*, 152 N.C. App. 532, 539-40, 568 S.E.2d 219, 225 (2002) (quoting *Webster's Third New International Dictionary* 1372 (1968)).

In *Wallace v. M, M & R, Inc.*, 165 N.C. App. 827, 833, 600 S.E.2d 514, 518 (2004), this Court addressed whether an employee of the

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defendants' nightclub was a manager within the meaning of N.C. Gen. Stat. § 1D-15(c). In concluding that the employee was in fact a manager, the Court found significant the fact that: (1) the employee was designated a manager; (2) the employee had supervisory powers; (3) the employee gave input on hiring and firing decisions and participated in personnel meetings; (4) the employee set work schedules for other employees; and (5) the employee handled money and controlled dispensing alcohol. *Id.*

In this case, Mr. Witherspoon's title at the time of the incident was Assistant Dining Room Manager, and he introduced himself as the "manager in charge" when he first came over to the Everharts' table. Renaldo Famble, the restaurant's Service Manager and Mr. Witherspoon's boss, testified that "every assistant manager is responsible for the restaurant." O'Charley's' regional operations director further testified that in Mr. Witherspoon's position, he "direct[ed] what is going on on the shift," including authorizing customer refunds, comping meals, and coordinating other employees' breaks. Mr. Witherspoon also gave input on "decid[ing] who is hired and who is fired[.]" Based on *Wallace*, we conclude that there is sufficient evidence that Mr. Witherspoon was a "manager" of O'Charley's for punitive damages purposes. *See also Miller*, 152 N.C. App. at 539-40, 568 S.E.2d at 225 (holding employee was manager where employee had supervisory powers, including power to hire and fire employees, and worked "directly under" and "hand-in-hand" with owner of restaurant).

Finally, O'Charley's argues that Ms. Everhart failed to produce sufficient evidence that the willful and wanton conduct, if any, was related to Ms. Everhart's injuries. N.C. Gen. Stat. § 1D-15(a) requires that the fraud, malice, or willful or wanton conduct be "*related to the injury for which compensatory damages were awarded[.]*" (Emphasis added.) Citing to medical causation cases, O'Charley's asserts that Ms. Everhart was required to present evidence of a causal connection between Mr. Witherspoon's conduct and Ms. Everhart's injuries.

O'Charley's' argument, however, overlooks the fact that the statute is not phrased in terms of causation, but instead uses the phrase "related to." *Id.* Where, as here, "a statute does not define a term, we must rely on the common and ordinary meaning of the words used." *Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 722, 670 S.E.2d 629, 634 (2009), *disc. review denied*, 363 N.C. 374, 678 S.E.2d 665 (2009). The term "related" is defined as

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“having a relationship” or “connected by reason of an established or discoverable relation.” *Webster’s Third New International Dictionary* 1916 (1968). *See State v. Abshire*, 363 N.C. 322, 329, 677 S.E.2d 444, 449-50 (2009) (using dictionary definition to determine ordinary meaning of word in statute where statute did not define term). This definition does not denote a causal connection, and, therefore, we cannot import a causation requirement into the statute. *See State v. Hardy*, 67 N.C. App. 122, 125, 312 S.E.2d 699, 702 (1984) (holding that unambiguous statutes “must be construed as written” and courts are “without power to interpolate or to superimpose provisions not contained therein”).

Indeed, this Court, in addressing the necessary relationship between the defendant’s aggravating conduct and the plaintiff’s injuries, has previously held that the language of N.C. Gen. Stat. § 1D-15(c) requires only that a plaintiff demonstrate a “*connection* between the [aggravating conduct] and plaintiff[’s] alleged harm.” *Schenk v. HNA Holdings, Inc.*, 170 N.C. App. 555, 560-61, 613 S.E.2d 503, 508, *disc. review denied*, 360 N.C. 177, 626 S.E.2d 649 (2005) (emphasis added). Thus, contrary to O’Charley’s’ argument, Ms. Everhart was not required to prove that the willful and wanton conduct caused Ms. Everhart’s injuries, but rather was required to prove a connection between that conduct and her injuries.

We hold Ms. Everhart presented sufficient evidence of the necessary “connection.” The Auto-Chlor warning label stated that if someone ingested the solution, poison control or a doctor should be contacted immediately and the person should not attempt to induce vomiting unless directed to do so by poison control or the doctor. The label also indicated that the person should try to sip water if possible. Because Mr. Witherspoon was following the O’Charley’s policy, he never attempted to find out if Ms. Everhart had ingested Auto-Chlor and never read the label to learn what first aid steps were necessary to treat ingestion of Auto-Chlor. Despite the fact that the solution’s warning label explicitly instructed not to induce vomiting and to try to drink water if possible, Ms. Everhart testified that she was in the bathroom for approximately five minutes trying to make herself throw up. Ms. Everhart was never told to try to sip water and she testified that she had blisters and sores on her lips and in her mouth, had a sore throat, and experienced nausea, heartburn, indigestion, and reflux for a week afterward. This evidence was sufficient to show a connection between the failure to investigate what Ms. Everhart drank and her injuries.

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In addition to her physical injuries, Ms. Everhart also testified about her emotional distress while driving to the hospital:

We had no information at all, just my having tasted it and what I had spat out had already bleached out my shirt—I mean, in that short a period of time. And I was scared because I felt like if this liquid had done this to my shirt that quickly, what is it doing to my insides[?] I mean, I was just petrified. I didn't know what was going on inside.

A jury could also find a connection between this evidence of Ms. Everhart's emotional injuries and Mr. Witherspoon's deliberate disregard of the need to obtain information regarding what Ms. Everhart had swallowed.

O'Charley's also urges that expert evidence was required to prove the necessary relationship, but relies on authority addressing causation and not a "connection" or "related[ness]." The actual issue set out in N.C. Gen. Stat. § 1D-15(c) does not, in this case, require expert evidence. *See Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (recognizing that expert evidence is not necessary to prove causation in the " 'many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of' " (quoting *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965))).

With respect to Ms. Everhart's emotional distress, contrary to O'Charley's contention, this Court has held that even in cases involving intentional or negligent infliction of emotional distress, expert medical evidence is not necessarily required. *See Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 450, 579 S.E.2d 505, 508 (2003) (holding that "[p]roof of 'severe emotional distress' does not necessarily require medical evidence or testimony"); *McKnight v. Simpson's Beauty Supply, Inc.*, 86 N.C. App. 451, 454, 358 S.E.2d 107, 109 (1987) (concluding trial court erred in dismissing claim for intentional infliction of emotional distress for lack of expert evidence because "[t]hough expert medical testimony may be necessary to establish that some types of emotional distress were suffered or that it was caused by a defendant's outrageous conduct, such testimony was not indispensable to a jury trial on plaintiff's claim"). We hold that, under the circumstances of this case, Ms. Everhart's testimony was competent to address whether her emotional injuries were related to the willful and wanton conduct.

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Thus, we conclude that the evidence at trial, viewed in the light most favorable to Ms. Everhart, was sufficient to permit the jury to reasonably conclude that Mr. Witherspoon's refusal, pursuant to corporate policy, to find out what Ms. Everhart had ingested and learn what first aid was necessary is "related" to Ms. Everhart's injuries. We conclude, therefore, that the trial court did not err in denying O'Charley's motion for JNOV as to the punitive damages verdict.

III

[3] O'Charley's also argues that the trial court should have granted its motion for a new trial. It claims (1) that the punitive damages award was "grossly excessive" and violated its due process rights and (2) the jury manifestly disregarded the trial court's instructions in calculating the amount of punitive damages to award.

N.C. Gen. Stat. § 1D-25(b) provides that "[p]unitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever is greater." The statute further states that "[i]f a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount." *Id.* Here, as the jury awarded Ms. Everhart \$10,000.00 in compensatory damages, the trial court reduced the jury's punitive damages award of \$350,000.00 to \$250,000.00 in accordance with N.C. Gen. Stat. § 1D-25(b).

Whether a punitive damages award is unconstitutionally excessive is a question of law reviewed de novo on appeal. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436, 149 L. Ed. 2d 674, 687, 121 S. Ct. 1678, 1682-83 (2001) ("[C]ourts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards."). O'Charley's contends that "the punitive damages award can only be described as grossly excessive and arbitrary[.]" because "[e]ven with the Court's statutory reduction of the award from \$350,000 to \$250,000, [O'Charley's] faces an award that is 25 times the amount of the compensatory damages."

When a punitive damages award is "grossly excessive," it violates the due process clause of the Fourteenth Amendment. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 134 L. Ed. 2d 809, 822, 116 S. Ct. 1589, 1596 (1996). The *BMW* Court set out three "guideposts" for evaluating whether a punitive damages award is grossly excessive: (1) the

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degree of reprehensibility of the defendant's conduct; (2) the disparity between the compensatory and punitive damages awards; and (3) available sanctions for comparable conduct. *Id.* at 574-75, 134 L. Ed. 2d at 826, 116 S. Ct. at 1598-99.

This Court applied the *BMW* factors in *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 562 S.E.2d 82 (2002), *aff'd on other grounds*, 358 N.C. 160, 594 S.E.2d 1 (2004).¹ In *Rhyne*, 149 N.C. App. at 689, 562 S.E.2d at 94, the evidence showed that one of the defendant's employees attacked Mr. Rhyne, putting him in a chokehold for several minutes, while another employee pushed Mrs. Rhyne to the ground and prevented her from helping her husband. The defendant also took out assault charges against Mr. Rhyne in an attempt to prevent them from pressing charges against defendant's employees. *Id.* At trial, the jury awarded Mr. Rhyne \$8,255.00 and Mrs. Rhyne \$10,730.00 in compensatory damages. *Id.* at 676, 562 S.E.2d at 87. The jury further awarded the Rhynes \$11.5 million each in punitive damages. *Id.* As in this case, the trial court reduced the punitive damages award to \$250,000.00 each under N.C. Gen. Stat. § 1D-25. *Rhyne*, 149 N.C. App. at 676, 562 S.E.2d at 87.

In holding that the punitive damage awards were not unconstitutionally excessive, this Court, considering the first *BMW* factor, emphasized the violent nature of the defendant's employees' conduct and that it went beyond mere negligence. *Id.* at 689, 562 S.E.2d at 94. With respect to the second factor, the Court considered the ratios of the punitive damages to the compensatory damages—"30 to 1 for Mr. Rhyne and 23 to 1 for Mrs. Rhyne"—to be "relatively low." *Id.* As for the third *BMW* factor, the Court declined to consider the punitive damages award excessive in light of the General Assembly's judgment concerning appropriate sanctions for the conduct at issue. *Id.*

As in *Rhyne*, we conclude that application of the *BMW* factors to the facts of this case similarly establishes that the punitive damages award is not unconstitutionally excessive. As for the reprehensibility of O'Charley's' conduct, the first *BMW* factor, the evidence tends to show that Mr. Witherspoon knew that Ms. Everhart had drunk some unknown substance that had made her ill, but he consciously chose not to identify what had actually been served to her or to determine the recommended first aid protocol until after she had already gone to the hospital. Instead, Mr. Witherspoon, consistent with the

1. In affirming this Court's decision, the Supreme Court upheld the constitutionality of N.C. Gen. Stat. § 1D-25, but did not address whether the amount of punitive damages awarded in the case was unconstitutionally excessive.

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O'Charley's policy, focused on completing an incident report form used to anticipate litigation against O'Charley's, ignoring Mr. Everhart's concerns about his wife's safety. O'Charley's policy, as followed by Mr. Witherspoon—which places priority on protecting O'Charley's against civil liability over first aid for customers unless the customer is “convulsing, passed out on the floor,” or “bleeding profusely”—rises to the level of reprehensible conduct.

As for the second *BMW* factor, the ratio of Ms. Everhart's punitive damages to compensatory damages—\$250,000 to \$10,000 = 25:1—falls within the same range as the plaintiffs' awards in *Rhyne* that this Court held was “relatively low.” *Id.* Accordingly, based on *Rhyne*, we hold that the ratio in this case is not unconstitutionally excessive under *BMW*. See also *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462, 125 L. Ed. 2d 366, 382, 113 S. Ct. 2711, 2723 (1993) (concluding that punitive damages award 526 times amount of actual damages was “certainly large” but not “so ‘grossly excessive’ as to be beyond the power of the State to allow”).

The third *BMW* “guidepost” requires consideration of civil or criminal penalties that could be imposed for comparable misconduct, giving “ ‘substantial deference’ to legislative judgments concerning appropriate sanctions for the conduct at issue.” *Rhyne*, 149 N.C. App. at 688-89, 562 S.E.2d at 94 (quoting *BMW*, 517 U.S. at 584, 134 L. Ed. 2d at 832, 116 S. Ct. at 1603). N.C. Gen. Stat. § 106-129 (2007), the only statute cited by O'Charley's, prohibits the adulteration of food. N.C. Gen. Stat. § 106-124.1(a) (2007) imposes a maximum civil penalty of \$2,000.00 for violating N.C. Gen. Stat. § 106-129. O'Charley's views the “gross disparity between the punitive damages award here and the only comparable civil penalty [as] yet another indicium of the award's excessiveness.”

In addition to the civil penalty, however, N.C. Gen. Stat. § 106-124 makes the violation of N.C. Gen. Stat. § 106-129 a Class 2 misdemeanor. In turn, N.C. Gen. Stat. § 15A-1340.23(c) (2007) provides that the maximum sentence for a Class 2 misdemeanor is 60 days imprisonment. The Supreme Court in *BMW* noted that it had upheld punitive damage awards “ ‘much in excess of the fine that could be imposed,’ ” where “imprisonment was also authorized in the criminal context.” 517 U.S. at 583, 134 L. Ed. 2d at 831, 116 S. Ct. at 1603 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23, 113 L. Ed. 2d 1, 23, 111 S. Ct. 1032, 1046 (1991)). Thus, in cases such as this one, exposure to criminal liability for comparable conduct justifies a larger punitive-to-compensatory damages ratio. Ultimately, in light of

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the reprehensibility of O'Charley's' conduct, the relatively low ratio of punitive damages to compensatory damages, and the civil and criminal sanctions that might have been imposed for similar conduct, we conclude that the trial court did not err in determining that the punitive damages award in this case does not violate O'Charley's' due process rights.

O'Charley's argues that, in any event, the trial court should have granted its motion for a new trial under Rule 59(a)(5) ("[m]anifest disregard by the jury of the instructions of the court"), Rule 59(a)(6) ("[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice"), and Rule 59(a)(7) ("[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law"). Denial of a motion for a new trial pursuant to N.C.R. Civ. P. 59(a)(5) and (6) is reviewed for an abuse of discretion, while the sufficiency of the evidence to justify the verdict is reviewed under a de novo standard. *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 371, 649 S.E.2d 14, 25 (2007).

Turning first to the sufficiency of the evidence, N.C. Gen. Stat. § 1D-35 (2007) provides that in determining the amount of punitive damages, the trier of fact "[m]ay consider only that evidence that relates" to: (1) "[t]he reprehensibility of the defendant's motives and conduct"; (2) "[t]he likelihood, at the relevant time, of serious harm"; (3) "[t]he degree of the defendant's awareness of the probable consequences of its conduct"; (4) "[t]he duration of the defendant's conduct"; (5) "[t]he actual damages suffered by the claimant"; (6) "[a]ny concealment by the defendant of the facts or consequences of its conduct"; (7) "[t]he existence and frequency of any similar past conduct by the defendant"; (8) "[w]hether the defendant profited from the conduct"; and (9) "[t]he defendant's ability to pay punitive damages, as evidenced by its revenues or net worth." N.C. Gen. Stat. § 1D-35(2)(a)-(i). Without specifically citing to any factor, defendant argues that there is a "paucity of evidence supporting the jury's excessive award."

In concluding that the punitive damages award was "justified," the trial court found, based on the evidence presented, (1) that after drinking the Auto-Chlor mixture, Ms. Everhart believed she had ingested "poison" and was in great emotional distress while trying to induce vomiting in the bathroom; (2) that in response to the incident Mr. Witherspoon interviewed Mr. Everhart to complete an incident report form, which is used to collect biographical data and other

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information in anticipation of litigation; (3) that it was O'Charley's policy to complete the incident report form before investigating the nature of the chemical unless the customer was "bleeding, passed out, or convulsing on the floor"; (4) that Mr. Witherspoon "refused to respond" to Mr. Everhart's question about whether he knew what Ms. Everhart had been served, "instead only asking the next question on the incident report"; (5) that when Ms. Everhart's server returned to the table, Mr. Witherspoon neither asked the server if he knew what was in the pitcher nor directed the server to find out; and (6) that at no time before Ms. Everhart left for the hospital did "Mr. Witherspoon look for the label of the sanitizing solution to provide to Mr. or Mrs. Everhart instructions on what to do or not to do for her injuries." We agree that the evidence would permit the jury to find these facts and that these facts support the jury's punitive damages award in light of the factors set out in N.C. Gen. Stat. § 1D-35(2). *See Greene v. Royster*, 187 N.C. App. 71, 80, 652 S.E.2d 277, 283 (2007) (holding that trial court's order denying motion for new punitive damages trial contained sufficient findings, "all supported by evidence adduced at trial, in support of its conclusion that the jury's punitive damages verdict was amply supported by the evidence").

O'Charley's next argues that "by implication" from the lack of evidence, "the jury disregarded the Court's instructions, and instead based its verdict on passion and prejudice against [O'Charley's]." In *Greene*, 187 N.C. App. at 81, 652 S.E.2d at 283, however, this Court upheld the denial of a motion for a new trial pursuant to Rule 59(a)(6) where the "defendants offered the trial court no facts which support their argument that the jury acted with passion and prejudice." Similarly, here, O'Charley's points to nothing in the record—except the award itself—that might indicate that the jury disregarded the trial court's instructions or awarded punitive damages under the influence of passion or prejudice. O'Charley's arguments instead repeat the contentions we found unpersuasive regarding its JNOV motion. As O'Charley's fails to make any separate and distinct arguments in support of its motion for a new trial, we hold that the trial court did not err in denying O'Charley's motion for a new trial.

No Error.

Judges BRYANT and STEPHENS concur.

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JAMES R. CARCANO, JOANNE CARCANO AND CARCANO REALTY GROUP, LLC,
PLAINTIFFS v. JBSS, LLC, AND DAVID BROWDER, LUCY BROWDER & JASON
BROWDER, DEFENDANTS

No. COA08-1423

(Filed 6 October 2009)

1. Appeal and Error— interlocutory order—substantial right—possibility of inconsistent verdicts

Plaintiffs' appeal from an interlocutory order dismissing their claims for unjust enrichment, unfair and deceptive trade practices, common law fraud/breach of fiduciary duty, constructive trust, and punitive damages affected a substantial right and was entitled to immediate appellate review because there were factual issues common to the dismissed claims and the remaining breach of contract claim which could result in inconsistent verdicts.

2. Contracts— breach of contract—summary judgment

There were numerous issues of fact and law that precluded summary judgment on a breach of contract claim.

3. Trusts— constructive trust—summary judgment

The trial court did not err by granting summary judgment in favor of defendants on a constructive trust issue because defendants did not, as a matter of law, come into possession or control of the legal title to the pertinent properties.

4. Unfair Trade Practices— failure to show affect on commerce—summary judgment

The trial court did not err by granting summary judgment for defendants on the issue of unfair and deceptive trade practices because the alleged events and statements did not affect commerce outside the parties' limited business relationship.

5. Fraud— constructive fraud—breach of fiduciary duty—mistake—summary judgment

The trial court did not err by granting summary judgment in favor of defendants on the issues of fraud, constructive fraud, and breach of fiduciary duty based on the alleged misrepresentation of the legal existence of a limited liability company. There was no evidence of an intent to deceive and plaintiffs could not show that defendants participated in a transaction through which they sought to benefit themselves.

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6. Unjust Enrichment— summary judgment—no better legal position

The trial court did not err by granting summary judgment in favor of defendants on the issue of unjust enrichment because defendants were in no better legal position than plaintiffs and were not unjustly enriched.

7. Damages and Remedies— punitive damages—summary judgment—breach of contract

The trial court did not err by granting summary judgment in favor of defendants on the issue of punitive damages under N.C.G.S. § 1D-15. Punitive damages are not awarded against a person solely for breach of contract.

Appeal by plaintiffs from order entered 3 October 2008 by Judge Laura J. Bridges in Rutherford County Superior Court. Heard in the Court of Appeals 7 April 2009.

King Law Offices, PLLC, by Brian W. King, for plaintiff appellants.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Esther E. Manheimer, for defendant appellees.

HUNTER, JR., Robert N., Judge.

James Carcano, individually, and Carcano Realty, LLC (“plaintiffs”), seek damages arising out of their investments in North Carolina real estate purchased with David Browder, Lucy Browder, and Jason Browder (the “Browders”). Plaintiffs’ theories include claims for breach of contract, unfair and deceptive trade practices, common law fraud/breach of fiduciary duty, unjust enrichment, constructive trust, and punitive damages. On 3 October 2008, the trial court heard cross motions for summary judgment and dismissed all of plaintiffs’ claims except breach of contract. From this order of partial summary judgment, plaintiffs appeal.

We affirm.

I. Facts

James Carcano (“Carcano”), a licensed New York attorney, owns Carcano Realty Group, LLC (“Carcano Realty”), a New York limited liability “corporation.” Defendants David Browder, Lucy Browder, and Jason Browder are all citizens and residents of South Carolina.

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In November 2005, Lucy Browder purchased two pieces of Rutherford County property, 93 Flynn Court and 237 Wren Court. According to the deeds, ownership was vested in “JBSS, LLC.” The Browders intended to sell these and other pieces of property in the Lake Lure area. After the purchase of these lots, in November 2005, Felix Carcano, a long-time friend and business acquaintance of David Browder, introduced David Browder to his brother, Carcano. Carcano, Felix Carcano, and the Browders then entered a business arrangement to buy undeveloped lots for development in the Lake Lure area in a newly created or soon to be formed entity presumably a limited liability company “JBSS, LLC.”

The parties and David Browder agreed that ownership in the venture was to be shared: Lucy Browder (David Browder’s spouse), 33%; James Carcano, 33%; Felix Carcano, 33%; and Jason Browder, 1%. In this business arrangement, David Browder was to be the manager of the venture and would handle the research, day-to-day business, purchases of property, negotiate contracts for construction and oversee property development. The parties agree that the venture was to share profits. To capitalize the business, Carcano and Felix Carcano were to contribute \$100,000 each to the business, and Lucy Browder was to contribute the 93 Flynn Court and 237 Wren Court properties. The parties disagree upon whom the responsibility fell to prepare a written, formal operating agreement that would reflect the above-mentioned terms.

Despite the failure to complete the proper organization of a limited liability company at this earlier time, David Browder operated under the “mistaken” belief and represented to Carcano that “JBSS, LLC” was properly formed as a limited liability company. According to David Browder, the “mistaken” belief was based upon communications with a South Carolina law firm where his wife, Lucy Browder, was employed in which another employee of the firm stated to him that the “LLC” had been formed.

In December 2005, David Browder, purportedly acting on behalf of “JBSS, LLC,” signed contracts to purchase land from the Fairfield Mountains Property Owners’ Association. Carcano Realty sent approximately \$24,000.00 electronically to David Browder for earnest money deposits. Of these funds \$16,000.00 was returned to David Browder, and Fairfield properties retained \$8,000 which was applied to an application fee and security deposit for the development of the vacant lot 53 Flynn Court.

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David Browder, purportedly acting for “JBSS, LLC,” contracted to purchase three additional properties in the Fairfield Mountains subdivision including: 3 Apple Valley Forest, 215 Quail Ridge, and 12 Roundabout. To purchase the Quail Ridge property, on 28 March 2006, Carcano Realty Group transferred \$11,000.00 to the closing attorney’s escrow account. In May 2006, David Browder requested funds from Carcano to purchase the other two properties. Carcano Realty then transferred \$60,000.00 on 15 May 2006 to purchase the Apple Valley Forest and Roundabout properties. The final purchase prices for the properties were: 215 Quail Ridge (\$15,000.00); 12 Roundabout (\$39,000.00); and 3 Apple Valley (\$20,000.00).

After the purchase of these properties, the parties discovered that “JBSS, LLC” had not been formed.¹ Plaintiff filed suit on 14 November 2006, which was subsequently answered by defendants on 30 January 2007. Discovery ensued.

On 28 August 2008, David Browder formed an entity entitled “JBSS, LLC”, in South Carolina by filing the Articles of Organization with the Secretary of State of the State of South Carolina. These articles do not mention plaintiffs as members or managers of the newly formed entity. Counsel for defendants contacted the grantors of all five properties requesting that the grantors execute new deeds to the newly formed entity, “JBSS, LLC.” No new deeds for the properties are included in the record.

On the cross motions for summary judgment, the trial court denied plaintiffs’ motion for summary judgment and granted defendants’ motion for summary judgment on all claims except breach of contract. Plaintiffs appeal.

II. Issues

On appeal plaintiffs contend that the trial court erred in granting partial summary judgment to defendants and failing to grant summary judgment to plaintiffs for: (1) unfair and deceptive trade practices, where defendants induced plaintiffs to invest in “JBSS, LLC” through misleading and fraudulent representations; (2) unjust enrichment, where defendants exercised dominion over plaintiffs’ invest-

1. As discussed hereinafter, this litigation concerns only a dispute between the alleged purchasers or investors in the four lots described above. The record contains no evidence that any of the parties have taken action to secure valid ownership through litigation or otherwise to the four lots or have taken action to clarify the legal status of the limited liability company. The legal effect of this lack of evidence is discussed under Section B hereinafter.

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ment and were unjustly enriched; (3) constructive trust, where defendants fraudulently obtained plaintiffs' money and used it to purchase the property held in an entity in which plaintiffs had no control; (4) common law fraud, where defendants knowingly made false representations about the status of the LLC to induce plaintiffs to continue funding the venture; and (5) punitive damages, where defendants acted fraudulently. Plaintiffs also contend the trial court erred by denying a grant of summary judgment to plaintiffs for their claim for breach of contract where defendants failed to grant plaintiffs an agreed upon proportional interest in an LLC.

III. Standard of Review

A grant of summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). An appeal from an order granting summary judgment solely raises issues of whether on the face of the record there is any genuine issue of material fact, and whether the prevailing party is entitled to judgment as a matter of law. *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 352, 595 S.E.2d 778, 781 (2004). A defendant may show entitlement to summary judgment by: "(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). After the required showing is made by the party seeking summary judgment, the burden is then on the "nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Draughon v. Harnett Cty. Bd. Of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 343 (2003) (citation omitted), *affirmed per curiam*, 358 N.C. 137, 591 S.E.2d 520, *reh'g denied*, 358 N.C. 381, 597 S.E.2d 129 (2004). We review a trial court's ruling on summary judgment de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

IV. Analysis

[1] As a preliminary matter, plaintiffs argue this appeal is properly before this Court as an appeal from an interlocutory order affecting a substantial right, pursuant to N.C. Gen. Stat. § 1-277 and N.C. Gen.

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Stat. § 7A-27(d)(1). An interlocutory order or judgment is one which is “made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy.” *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 37, 626 S.E.2d 315, 320, *disc. review denied*, 360 N.C. 531, 633 S.E.2d 674 (2006). An interlocutory order may be appealed, however, pursuant to N.C. Gen. Stat. § 1-277, which provides in pertinent part:

(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding[.]

N.C. Gen. Stat. § 1-277(a) (2007). Similarly, N.C. Gen. Stat. § 7A-27(d) recognizes that some actions have potentially serious consequences, such as when a “substantial right” is affected, and thus warrant an appeal. *See* N.C. Gen. Stat. § 7A-27(d)(1) (2007). If a trial court’s decision “deprives the appellant of a substantial right which would be lost absent immediate review,” an appeal of an interlocutory order is permitted. *Bob Timberlake Collection, Inc.*, 176 N.C. App. at 37, 626 S.E.2d at 320.

“With respect to those interlocutory orders which allegedly do affect a substantial right, our Supreme Court has additionally long required that the interlocutory ‘ruling or order deprive . . . the appellant of a substantial right *which he would lose if the ruling or order is not reviewed before final judgment.*’ ” *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5, 362 S.E.2d 812, 815 (1987) (quoting *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978)). If a party is faced with the possibility of undergoing a second trial, a substantial right is affected “when the same issues are present in both trials [which] creat[es] the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.” *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982); *cf. Oestreicher v. Stores*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (explaining plaintiff had the substantial right to have all “causes” tried at the same time by the same judge and jury, irrespective of issues).

In the case *sub judice*, the trial court’s grant of partial judgment to defendants is an interlocutory order because plaintiffs’ claim for

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breach of contract remains pending. In *Davidson v. Knauff Ins. Agency*, this Court stated that “so long as a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right *if* there are overlapping factual issues between the claim determined and any claims which have not yet been determined.” 93 N.C. App. 20, 26, 376 S.E.2d 488, 492, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). Here, the trial court’s dismissal of plaintiffs’ claims for unjust enrichment, unfair and deceptive trade practices, “common law fraud/breach of fiduciary duty,” constructive trust, and punitive damages affects a substantial right since there are factual issues common to the dismissed claims and the breach of contract claim it did not dismiss. *See, e.g., Vazquez v. Allstate Ins. Co.*, 137 N.C. App. 741, 745, 529 S.E.2d 480, 482 (2000) (Under North Carolina law, a plaintiff may maintain a breach of contract claim and an unfair and deceptive trade practices claim based on the same conduct.) Common to all claims is the factual issue of whether defendants caused plaintiffs’ damages by falsely representing that “JBSS, LLC,” validly existed as an LLC and by inducing plaintiffs to invest in the business. Because there are overlapping factual issues, inconsistent verdicts could result. We hold, thus, that the trial court’s grant of partial summary judgment to defendants affects a substantial right, and plaintiffs’ appeal is properly before us.

A. Breach of Contract

[2] “The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract.” *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). It is a well-settled principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement. *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995).

All parties, based upon the pleadings, appear to be in agreement that at sometime in November 2005, a contract was formed between plaintiffs and the Browders. Thereafter, each party contends that the terms of that agreement were modified or breached. The debate between the parties includes the issues of managerial control over the assets of the business, the form of the organization, capitalization of the enterprise, the withdrawal of equity members, and the responsibility of the parties to memorialize their agreement. Most, if not all, of these issues could be resolved had the business arrangement been reduced to writing; regretfully, it was not, and the legal consequences which flow from this omission produce this result. Subsequently, it is

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likely that N.C. Gen. Stat. § 59-36(a) (2007) which defines a partnership as an “association of two or more persons to carry on as co-owners a business for profit[]” will resolve these matters for the parties.

Given genuine factual disputes forecast by the parties in the verified pleadings and deposition testimony which was produced in the record for review, there appears to be numerous genuine issues of fact and law which would preclude summary judgment on the breach of contract issue. For example, plaintiffs allege in their complaint that Carcano thought he was investing in an already formed limited liability company. Later, Carcano and Felix Carcano were each to contribute \$100,000 in capital to the business, while Lucy Browder was to contribute the 93 Flynn Court and 237 Wren Court properties. Subsequently, Felix Carcano failed to make his contribution and allegedly this contribution was assumed by Joanne Carcano who later withdrew from the venture.

At the outset of the venture, Lucy Browder was to contribute land to the venture; however, it appears the deeds to the subject property which she was to contribute were void, since they were conveyed to a non-existent entity, “JBSS, LLC.”

In his deposition, Carcano testified, “I was assured that a partnership agreement was being written and would be forthcoming.” When asked, “And that would be what you considered to be the contract[,]” he replied, “Yes.” Carcano had offered at one point to draft the partnership agreement he referenced, but the agreement was never drafted. He likewise admitted that he had never asked to see any documentation as to the agreement of the formation of the LLC. Given that both parties agree that some contractual arrangement was entered into, what the terms were and whether they were breached is a genuine question of fact requiring jury resolution.

B. Constructive Trust

[3] Plaintiffs pled for the court to impose the remedy of a constructive trust based upon their allegations of “fraud/breach of fiduciary duty” or “unjust enrichment.” As discussed, *supra*, we do not believe plaintiffs have been able to show a forecast of evidence sufficient to raise genuine issues of facts with regard to these two claims. Constructive trusts ordinarily arise from actual or constructive fraud and usually involve the “‘breach of a confidential relationship.’” *Patterson v. Strickland*, 133 N.C. App. 510, 521, 515 S.E.2d 915, 921 (1999) (citation omitted). “Fraud is not automatically presumed by the ‘mere failure, nothing else appearing, to perform an agreement or

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to carry out a promise[.]” *Guy v. Guy*, 104 N.C. App. 753, 757, 411 S.E.2d 403, 405 (1991) (citation omitted). However, “‘a breach of agreement or promise may in connection with other circumstances give rise to such a trust.’” *Bank v. Insurance Co.*, 265 N.C. 86, 94-95, 143 S.E.2d 270, 276 (1965) (citation omitted). “To establish fraud the false representation must be of some material fact that is past or existing.” *Ferguson v. Ferguson*, 55 N.C. App. 341, 345, 285 S.E.2d 288, 291, *disc. review denied*, 306 N.C. 383, 294 S.E.2d 207 (1982).

As defendants correctly point out, “[c]ourts of equity will impose a constructive trust to prevent the unjust enrichment of the holder of the legal title to property acquired through a breach of duty, fraud, or other circumstances which make it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.” *Sara Lee Corp. v. Carter*, 351 N.C. 27, 35, 519 S.E.2d 308, 313 (citation omitted), *reh’g denied*, 351 N.C. 191, 541 S.E.2d 716 (1999).

Here, because the deeds purported to transfer ownership to a “JBSS, LLC,” a non-existent enterprise, they are void. This Court has clearly held that “[t]o be operative as a conveyance, a deed must designate as grantee [a living or] a legal person[.]” on the date of conveyance. *Piedmont & Western Investment Corp. v. Carnes-Miller Gear Co.*, 96 N.C. App. 105, 107, 384 S.E.2d 687, 688 (1989), *disc. review denied*, 326 N.C. 49, 389 S.E.2d 93 (1990) (holding that where a deed attempted to convey property to a plaintiff corporation during that plaintiff’s administrative suspension, the deed could not operate to convey title because the plaintiff had no legal existence on the date of the conveyance). *See also* James A. Webster, Jr., *Webster’s Real Estate Law in North Carolina* § 10-26, at 411 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999) (stating “[i]n order for a deed to be valid it must designate an existing person or legal entity as the grantee who is capable of taking title to the real property at the time of the execution of the deed”). *Id.* (footnote omitted). Therefore, before determining whether delivery of a deed (conditional or otherwise) was actually effective, we must first determine whether there is a living or legal person to whom that deed could be delivered.

No claim for declaratory judgment with regard to the ownership of these properties is contained within the pleadings. Therefore, there is no need for this Court or the trial court to address the issue of ownership of the property. Plaintiffs in their brief concede that their clients do not own the property. Although nominally “JBSS, LLC” was a party defendant, since it was never formed by the time the

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complaint was filed, it is difficult to see how a remedy or judgment could be ordered against it should it later be determined to be the owner of the properties. Plaintiffs misapprehend the nature of constructive trusts with resulting trust, which is the remedy more appropriate to these facts.

Trusts created by operation of law are classified into resulting trusts and constructive trusts.

[T]he creation of a resulting trust involves the application of the doctrine that valuable consideration rather than legal title determines the equitable title resulting from a transaction; whereas a constructive trust ordinarily arises out of the existence of fraud, actual or presumptive—usually involving the violation of a confidential or fiduciary relation—in view of which equity transfers the beneficial title to some person other than the holder of the legal title. Also, a resulting trust involves a presumption or supposition of law of an intention to create a trust; whereas a constructive trust arises independent of any actual or presumed intention of the parties and is usually imposed contrary to the actual intention of the trustee.

Bowen v. Darden, 241 N.C. 11, 13-14, 84 S.E.2d 289, 292 (1954).

Based upon the record evidence herein, it appears beyond factual issue that the Browders did not, as a matter of law, come into possession or control of the legal title to the five properties allegedly owned by “JBSS, LLC.” Therefore, constructive trust cannot be imposed as a remedy on them. We affirm the trial court.

C. Unfair and Deceptive Trade Practices Act (“UDTPA”)

[4] “To prevail on a claim of unfair and deceptive trade practices, a plaintiff must show: (1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby.” *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998). It is well recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract. *Lapierre v. Samco Dev. Corp.*, 103 N.C. App. 551, 559, 406 S.E.2d 646, 650 (1991). Our Supreme Court has also determined that, as to these elements, “‘some type of egregious or aggravating circumstances must be alleged and proved before the [Act’s] provisions may [take effect].” *Business Cabling, Inc. v. Yokeley*, 182 N.C. App. 657, 663, 643 S.E.2d 63, 68 (2007) (citations omitted).

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1. The Allegations are Insufficient to State a Claim Under UDTPA, Because They Do Not Constitute “Unfair or Deceptive Trade Practices”

We first consider whether defendants committed an unfair or deceptive act or practice. *See First Atl. Mgmt. Corp.*, 131 N.C. App. at 252, 507 S.E.2d at 63. A precise definition of “unfair methods of competition” as used in this section is not possible. *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 404, 248 S.E.2d 739, 746 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979). In determining the unfair or deceptive nature of an act or practice, each case is fact specific, and such determination depends upon “the impact the practice has in the marketplace.” *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Whether an act or practice is unfair or deceptive under this section is a question of law for the court. *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988).

We have previously explained that “[a] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.” *Business Cabling, Inc.*, 182 N.C. App. at 663, 643 S.E.2d at 68 (citation omitted). Stated another way, “‘a party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.’” *McInerney v. Pinehurst Area Realty, Inc.*, 162 N.C. App. 285, 289, 590 S.E.2d 313, 316-17 (2004). The “relevant gauge” of an act’s unfairness or deception is “[t]he effect of the actor’s conduct on the marketplace.” *Ken-Mar Finance v. Harvey*, 90 N.C. App. 362, 365, 368 S.E.2d 646, 648, *disc. review denied*, 323 N.C. 365, 373 S.E.2d 545 (1988).

Although commerce is intended to include all types of business activities, our case law reveals that the Act does not apply to all wrongs in a business setting. *Hageman v. Twin City Chrysler-Plymouth, Inc.*, 681 F. Supp. 303 (M.D.N.C. 1988) (Act does not apply to every dispute between parties); *compare McPhail v. Wilson*, 733 F. Supp. 1011 (W.D.N.C. 1990) (Act does not apply to claim of misrepresentation arising from allegedly fraudulent securities transaction); *Wilson v. Wilson-Cook Medical, Inc.*, 720 F. Supp. 533 (M.D.N.C. 1989) (Act does not apply to employee-employer relationship); *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 333 S.E.2d 236 (1985) (Act does not apply to securities transactions); *Wilson v. Blue Ridge Elec. Membership Corp.*, 157 N.C. App. 355, 358, 578 S.E.2d 692, 694 (2003) (Act does not apply to matters of internal corporate manage-

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ment, which do not affect commerce); *Buie v. Daniel International*, 56 N.C. App. 445, 289 S.E.2d 118, *disc. review denied*, 305 N.C. 759, 292 S.E.2d 574 (1982) (Act does not apply to employer-employee relations) *with United Labs, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (1988) (Act applies to covenant not to compete or to tortious interference with contracts); *Dalton v. Camp*, 138 N.C. App. 201, 531 S.E.2d 258 (2000) (Act applies to claims arising out of employee-employer relationship when employee solicited customers from employer and competed with employer while still in his employ); *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 248 S.E.2d 739 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979) (Act applies to disputes between competitors and not only to dealings between buyers and sellers).

In the case *sub judice*, the most egregious allegation made against defendants, and the crux of plaintiffs' claims, is that defendants "marketed membership in a fictional LLC" which involved "deception, lies, and misrepresentations." Even taken as true, these facts do not constitute unfair and deceptive practices so as to violate Chapter 75. The allegations merely assert that defendants asked plaintiffs to invest in a business arrangement. These are actions which are capital raising ventures among sophisticated business entrepreneurs. Where some defendants were also investing and were equally affected by the lack of formation of the LLC, they were in no better position than plaintiffs as to the property ownership, and thus there was no inequitable assertion of defendants' power or position. *See McInerney*, 162 N.C. App. at 289, 590 S.E.2d at 316-17. Defendants' actions did not violate the first requisite element of a claim under the Act.

2. The Allegations are Insufficient to State a Claim Under UDTPA, Because They are Not "In or Affecting Commerce"

Assuming *arguendo* plaintiffs' allegations did constitute unfair and deceptive practices, plaintiffs have failed to show that the acts and statements are "in or affecting commerce." *See First Atl. Mgmt. Corp.*, 131 N.C. App. at 252, 507 S.E.2d at 63; *see also Esposito v. Talbert & Bright, Inc.*, 181 N.C. App. 742, 746, 641 S.E.2d 695, 697-98 (2007), *disc. review denied*, 362 N.C. 234, 659 S.E.2d 440 (2008) (stating that the proper inquiry as to the second element is whether a defendant's allegedly deceptive acts affected commerce and that the Act does not apply even if the defendant's statements and actions were unfair or deceptive acts or practices that injured the plaintiff, where the plaintiff did not show that the defendant's statements and

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actions were “in or affecting commerce”); *HAJMM Co. v. House of Raeford Farms*, 328 N.C. 578, 593, 403 S.E.2d 483, 492 (1991) (Act does not apply to issuance or redemption of revolving fund certificates, as such activities were not “in or affecting commerce”); *J.M. Westall & Co. v. Windswept View of Asheville*, 97 N.C. App. 71, 75, 387 S.E.2d 67, 69, *disc. review denied*, 327 N.C. 139, 394 S.E.2d 175 (1990) (“[T]he proper inquiry is not whether a contractual relationship existed between the parties, but rather whether defendants’ allegedly deceptive acts *affected* commerce.”). Plaintiffs conclude that “[b]ecause the business transactions involved real estate, there is no controversy regarding the second element.” We disagree.

This Court, on several occasions, has considered the Act’s application to real estate transactions. In *Governor’s Club, Inc. v. Governor’s Club Ltd. P’ship*, 152 N.C. App. 240, 567 S.E.2d 781 (2002), *aff’d*, 357 N.C. 46, 577 S.E.2d 620 (2003), a golf club corporation sued the developer of the club and others alleging latent defects in and problems with the facilities. As to the unfair and deceptive trade practices claim, this Court explained that “[t]he business of buying, developing and selling real estate is an activity ‘in or affecting commerce’ for the purposes of G.S. § 75-1.1.” *Id.* at 250, 567 S.E.2d at 788.

In *Wilder v. Squires*, 68 N.C. App. 310, 315 S.E.2d 63, *disc. review denied*, 311 N.C. 769, 321 S.E.2d 158 (1984), a potential purchaser of real estate brought suit against a vendor of real estate that was actively engaged in the real estate business and threatened the purchaser with the loss of his full binder if he would not accept financing as offered by the vendor. This Court found that the vendor committed an unfair or deceptive trade practice, because the scheme was “in or affecting commerce.” *Id.* at 314-15, 315 S.E.2d at 66.

In *Stolfo v. Kernodle*, 118 N.C. App. 580, 455 S.E.2d 869 (1995), this Court considered the Act as applied to the renting of residential property. We determined that the rental of a house and a trailer space was “in or affecting commerce” for the purposes of liability pursuant to the Act. *Id.* at 581, 455 S.E.2d at 870.

Each of the above cases involved a business transaction in which there was a “provider” and a “consumer” of the product offered. *See Esposito*, 181 N.C. App. at 746, 641 S.E.2d at 698 (“Typically, claims under G.S. § 75-1.1 involve [a] buyer and seller[.]”); *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 446, 293 S.E.2d 901, 919, *disc. review denied and appeal dismissed*, 307 N.C. 127, 297

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S.E.2d 399 (1982) (“The General Assembly [in forbidding unfair and deceptive acts and practices] . . . is concerned with openness and fairness in those activities which characterize a party as a “seller.’ ”). *Id.* (citation omitted).

Conversely, in a case involving the private sale of a residence, this Court determined that such sale was beyond the purview of the Act. *Stephenson v. Warren*, 136 N.C. App. 768, 525 S.E.2d 809, *disc. review denied*, 351 N.C. 646, 543 S.E.2d 883 (2000). Although there was a transaction between a buyer and a seller—an exchange—the seller was not involved in the *business* of selling real estate. We held, therefore, that the transaction was not an act “in or affecting commerce.”

From the above cases we determine that while real estate transactions are a type of transaction within the purview of the Act, *see Governor’s Club, Inc.*, 152 N.C. App. at 250, 567 S.E.2d at 788, not all wrongs in a real estate transaction are summarily “in or affecting commerce,” as plaintiffs contend. Such business dealings were solely between plaintiffs and defendants in their limited business relationship. Any “marketing” of membership in order to raise capital for purchasing real estate was handled either directly between defendants and plaintiffs or involved Felix Carcano as an intermediary and had no impact on consumers or the marketplace. *See Business Cabling, Inc.*, 182 N.C. App. at 663, 643 S.E.2d at 68; *Ken-Mar Finance*, 90 N.C. App. at 365, 368 S.E.2d at 648; *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. Plaintiffs failed to show that defendants’ actions had any effect on commerce, and their allegations as to the second element of the Act also fail. *See Wilson*, 157 N.C. App. at 358, 578 S.E.2d at 694.

3. The Allegations of Damages Are Sufficient to State a Claim Under UTPA Because Plaintiffs Have Not Alleged an Actual, Concrete Injury in Fact

Finally, we consider whether plaintiffs have alleged an actual, concrete injury in fact that was caused by defendants. *See First Atl. Mgmt. Corp.*, 131 N.C. App. at 252, 507 S.E.2d at 63. To have standing to bring a claim under the Act, the plaintiff must prove the elements of standing, including “injury in fact.” *See Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005), *aff’d*, 360 N.C. 398, 627 S.E.2d 461 (2006). An injury in fact must be “‘distinct and palpable,’” and must not be “‘abstract or conjectural or hypothetical.’ ” *Id.* (citation omitted). We agree that the plaintiffs’ allegations of monetary damages are sufficiently palpable to meet the showing required of an actual, concrete injury.

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Plaintiffs' allegations fail to state a claim under the North Carolina UDTPA, because under any statement of facts which could be proven, the events that allegedly occurred and defendants' alleged statements and actions do not rise to the level of unfair and deceptive trade practices. The allegations do not affect "commerce" outside the dealings of the parties' limited business relationship. *Wilson*, 157 N.C. App. at 358, 578 S.E.2d at 694. For these reasons, the trial court properly granted summary judgment to defendants as to plaintiffs' claim for unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1.

D. Fraud

[5] Fraud includes two categories, actual and constructive. *Forbis v. Neal*, 361 N.C. 519, 526, 649 S.E.2d 382, 387 (2007). Both will be discussed as they apply to the record in this sequence. The critical factor in the application of either of these theories lies in the characterization of the facts which plaintiffs claim and defendants deny are misrepresented. In this record, the critical factor alleged to have been misrepresented is the legal existence of a limited liability company in November 2005.

The evidence is uncontradicted that the Browders, outside of the relationship with plaintiffs, believed that "JBSS, LLC" was properly formed. Two properties which were to be contributed to this enterprise by Lucy Browder were not titled in her name but in "JBSS, LLC." Deposition testimony by David Browder explains his "mistaken" belief in the existence of "JBSS, LLC." There would have been no advantage for the Browders to title properties to a non-existent entity voiding a conveyance for which some consideration on behalf of the Browders would have been forthcoming. Competent evidence exists as to the existence of a mistake on the part of the Browders. Plaintiffs' relying on the representations of the Browders were likewise mistaken. We do not believe this evidence supports the plaintiffs' claims as to fraud, constructive fraud or breach of fiduciary duty.

1. Actual Fraud

To prove actual fraud, a plaintiff must be damaged by the fraud of the defendant. The plaintiff has the burden of showing six things: First, the defendant must make a false representation of a material fact. The alternative proof a plaintiff may provide is based on concealment of a material fact which does not apply to these facts, since an actual representation was made. A fact is material, if had it been known to the party, it would have influenced that party's decision in

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making the contract at all. *Godfrey v. Res-Care, Inc.* 165 N.C. App. 68, 75, 598 S.E.2d 396, 402, *disc. review denied*, 359 N.C. 67, 604 S.E.2d 310 (2004). It is clear that the legal existence of the “JBSS, LLC,” qualifies as a “material fact,” and it was misrepresented to plaintiffs by David Browder. There is, however, no proof that it was misrepresented to plaintiffs by any of the other defendants. Plaintiffs have therefore forecast sufficient evidence to meet this element.

Secondly, under these facts plaintiffs must show that the misrepresented material fact was known to be false or makes it recklessly, without any knowledge of its truth or falsity, as a positive assertion. *Tarlton v. Keith*, 250 N.C. 298, 304, 108 S.E.2d 621, 624-25 (1959); *Atkinson v. Charlotte Builders*, 232 N.C. 67, 68, 59 S.E.2d 1, 1-2 (1950). However, there is no competent evidence in the record that the false representation was reasonably calculated to deceive or was made with intent to deceive. This Court has explained that the scienter required for fraud “is not present without both knowledge and an intent to deceive, manipulate, or defraud.” *RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 745, 600 S.E.2d 492, 498 (2004).

The basis of plaintiffs’ claims is that “JBSS, LLC,” was not legally formed prior to the real estate lots purchased. Browder testified that he discovered that the LLC had not been formed only after all five properties had been purchased. He explained that he relied on information provided by an employee of the law firm that was to form the LLC who reported to Browder that the “LLC had been formed.” Browder testified that he assumed that the employee meant “JBSS, LLC”; however, this employee was actually referring to Premier Motorcar, LLC, a company that Browder had formed earlier for another business venture.

Plaintiffs have failed to show a forecast of evidence that Browder had any knowledge of the falsity of his representation as to the formation of the LLC; thus, he did not have the requisite scienter for fraud, and he had no “intent to deceive, manipulate, or defraud.” See *RD&J Props.*, 165 N.C. App. at 745, 600 S.E.2d at 498. The proof in this case shows an innocent, or at most a negligent, misrepresentation at best. The trial court was justified in dismissing the claims.

2. Constructive Fraud/Breach of Fiduciary Duty

Plaintiffs’ claims for damages for constructive fraud/breach of fiduciary duty likewise fail. To defeat a motion for summary judgment

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when a claim for constructive fraud is made, a plaintiff must show evidence of a “ ‘relation of trust and confidence . . . [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.’ ” *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (citation omitted). The basis of a claim for constructive fraud is the existence of a confidential or fiduciary relationship. *Id.*

A fiduciary relationship exists “ ‘in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.’ ” *HAJMM Co.*, 328 N.C. at 588, 403 S.E.2d at 489 (citations omitted). Whether such a relationship exists is generally a question of fact for the jury. *Stamm v. Salomon*, 144 N.C. App. 672, 680, 551 S.E.2d 152, 158 (2001), *disc. review denied, appeal dismissed*, 355 N.C. 216, 560 S.E.2d 139 (2002). As a matter of law, however, business partners are fiduciaries to one another. *HAJMM Co.*, 328 N.C. at 588, 403 S.E.2d at 489. In our analysis, we agree with plaintiffs that whatever the undefined business relationship was between the parties, it created a fiduciary relationship, primarily because it is undisputed that Carcano deposited funds with David Browder for the purchase of real estate, which would clearly support a finding that plaintiffs placed special confidence in David Browder.

However, constructive fraud requires more than a fiduciary relationship. In *Barger*, 346 N.C. at 666, 488 S.E.2d at 224, the Supreme Court wrote that “[i]mplicit in the requirement that a defendant ‘[take] advantage of his position of trust to the hurt of plaintiff’ is the notion that the defendant must seek his own advantage in the transaction[.]” The Court then stated that “[t]he *requirement* of a benefit to defendants follows logically from the requirement that a defendant harm a plaintiff by taking advantage of their relationship of trust and confidence.” *Id.* at 667, 488 S.E.2d at 224 (emphasis added).

In the instant case, plaintiffs could not show specific facts creating a triable issue that defendants participated in a transaction through which they sought to benefit themselves. Defendants have no greater legal interest in the properties than do plaintiffs. Neither party has any legal interest in these properties as the record title shows. The fact is that the business invested in properties that benefitted neither party. The trial court correctly granted summary judgment as to plaintiffs’ constructive fraud claim.

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E. Unjust Enrichment

[6] Plaintiffs' allegations fail to state a claim for unjust enrichment. Unjust enrichment has been defined as follows:

"Unjust enrichment" is a legal term characterizing

the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor.

Ivey v. Williams, 74 N.C. App. 532, 534, 328 S.E.2d 837, 838-39 (1985) (citing Am. Jur. 2d *Restitution and Implied Contracts* Sec. 3, at 945 (1973)). To be successful in a claim for unjust enrichment, a plaintiff must show: " '(1) services were rendered to [the] defendants; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously.' " *Horack v. Southern Real Estate Co.*, 150 N.C. App. 305, 314, 563 S.E.2d 47, 54 (2002).

Plaintiffs argue that defendants have been unjustly enriched because plaintiffs contributed money towards the purchase of real estate, and defendants "personally exercised dominion over [plaintiffs'] funds instead of using them as agreed." The crux of this argument is that defendants exercised such dominion by purchasing 215 Quail Ridge, 12 Roundabout, and 3 Apple Valley "in their own names"; thus, plaintiffs do not hold legal title to the properties. As defendants note, however, both plaintiffs and defendants were buying property through the same business entity and thus "stand in the same legal position with respect to the properties."

As to the ownership of the property, when asked about the property being in "Lucy's name and not the LLC," Carcano stated: "No, you have it backwards. The properties are in the JBSS, LLC name." This statement, in conjunction with his claim of at least 33% ownership rights, indicates defendants were in no better legal position than plaintiffs, and defendants have not been unjustly enriched. The trial court correctly granted summary judgment to defendants on the issue of unjust enrichment.

F. Punitive Damages

[7] The award of punitive damages is governed by N.C. Gen. Stat. § 1D-15 (2007), "**Standards for recovery of punitive damages**," and is limited to cases involving fraud, malice or willful or wanton conduct. *Id.* "Punitive damages shall not be awarded against a

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person solely for breach of contract.” N.C. Gen. Stat. § 1D-15(d) (2007). Because we have affirmed the trial court that the sole remaining issue for trial is breach of contract, the trial court dismissed the punitive damages claim pursuant to N.C. Gen. Stat. § 1D-15. We agree.

V. Conclusion

Based upon the foregoing discussion, we affirm the trial court order dismissing all of plaintiffs’ claims, except the breach of contract claim, and remand the case to the trial court.

Affirmed in part and remanded.

Judges WYNN and JACKSON concur.

IN RE: SEARCH WARRANTS ISSUED IN CONNECTION WITH THE INVESTIGATION
INTO THE DEATH OF NANCY COOPER

No. COA08-1280

(Filed 6 October 2009)

1. Appeal and Error— mootness—order sealing search warrants—short duration—capable of repetition

A case concerning the denial of access to sealed search warrants was not moot where the warrants were sealed for thirty days and there was a reasonable expectation that the issue was capable of repetition.

2. Public Records— search warrants—sealed by court order—no abuse of discretion—no right of access

Plaintiffs (a newspaper and a television station) did not have a public records right of access to search warrants that had been sealed under a court order. The court did not abuse its discretion by sealing the warrants and related affidavits where the court found that the release of the information contained therein would undermine an ongoing homicide investigation and that sealing the warrants for a limited time was necessary to ensure the State’s right to prosecute and defendant’s right to a fair trial.

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3. Public Records— search warrants and affidavits—sealed—no abuse of discretion

The trial court did not abuse its discretion by issuing orders sealing search warrants and affidavits under North Carolina law.

4. Constitutional Law— First Amendment—right of access—search warrants

A newspaper and a television station did not have a First Amendment right of access to sealed search warrants and affidavits. Search warrants and related documents fail the first prong of the test in *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (1989).

5. Constitutional Law— North Carolina—open courts—sealed documents

The trial court properly applied the open courts provision of the North Carolina Constitution to the issue of access to sealed search warrants and affidavits. The qualified right of public access to criminal records is outweighed by compelling, countervailing governmental interests.

Appeal by Plaintiffs from judgment entered 31 July 2008 and 18 August 2008 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 6 May 2009.

Everett Gaskins Hancock & Stevens, LLP, by Hugh Stevens, C. Amanda Martin, and Michael J. Tadych, for Plaintiffs-Appellants.

Attorney General Roy A. Cooper, by Special Deputy Attorney General W. Dale Talbert, for the State.

BEASLEY, Judge.

Capitol Broadcasting Company, Incorporated, and The News and Observer Publishing Company (Plaintiffs) appeal orders issued on 31 July 2008 and 18 August 2008, denying their motions to unseal three search warrants and attendant papers related to the Cary Police Department's homicide investigation into the death of Nancy Cooper. We affirm.

On 16 July 2008, the Cary Police Department submitted an application for a search warrant, supported by a probable cause affidavit, to the trial court based upon an investigation into the homicide of Nancy Cooper. The application for the search warrant specified the

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premises, persons, and vehicles to be searched. The search warrant permitted the person of Bradley Graham Cooper, Nancy Cooper's husband, his residence at 104 Wallsburg Court in Cary, North Carolina, as well as two of his vehicles to be searched for "evidence of a crime and the identity of a person participating in a crime" under N.C. Gen. Stat. § 14-17.

After the trial court found that there was sufficient probable cause for the issuance of a search warrant, the trial court issued an *ex parte* sealing order, pursuant to N.C. Gen. Stat. § 132-1.4, subsections(e) and (k), that "this motion, order, search warrant, search warrant application and return results thereof be sealed and held by the Wake County Clerk of Court for an initial period of thirty (30) days[.]" The trial court ruled:

1. That the information contained in the search warrant, application and possible return results thereof fall within the purview of NCGS § 132.1.4(c).
2. That the release of this information will jeopardize the right of the State to prosecute a defendant or the right of a defendant to a fair trial or will undermine an ongoing or future investigation within the meaning of NCGS § 132.1.4(e).

On 21 July 2008, the Cary Police Department submitted an application for a second search warrant, also accompanied by a probable cause affidavit, to the trial court. The second search warrant permitted the search of Bradley Cooper's business office, located in Morrisville, North Carolina. The trial court issued the second search warrant and an *ex parte* order sealing the search warrant, search warrant application, and the return results for an initial period of thirty days on 21 July 2008. This sealing order was also issued pursuant to N.C. Gen. Stat. § 132-1.4, subsections (e) and (k). The trial court cited the same statutes, N.C. Gen. Stat. § 132-1.4, subsection (c) and (e), in the second sealing order which allow for sealing this information.

On 25 July 2008, the "State by and through the District Attorney" made a motion requesting the court to seal the application for a third search warrant. The application for the third search warrant permitted the search of several computers, financial documents, and files belonging to Bradley Cooper and relating to a homicide and disposal of a human body. The State argued:

[t]hat to publicly disclose the basis for the search warrant, or an inventory of matters recovered from the computers, might

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hamper or impede this investigation and/or may release information that could adversely affect persons who are not charged with committing a crime and materially prejudice further adjudicative procedures involving this investigation and any subsequent prosecution.

In response to the State's motion, the trial court issued an order on 25 July 2008, sealing the search warrant application, search warrant, and return results for thirty days. This order stated that the sealed documents were within the purview of an Administrative Order entered by the Senior Resident Superior Court Judge and the Chief District Court Judge, effective on 20 May 2008, as well as N.C. Gen. Stat. § 132-1.4(e). The trial court found that "the sealing of these items would preserve the integrity of the ongoing above referenced criminal investigation." The 20 May 2008 Administrative Order outlined the procedure for the processing and secure custody of investigative orders and search warrants issued by judicial officials in Wake County and was in effect for all three sealing orders. The Administrative Order provided, in pertinent part, that:

1. Law enforcement officers seeking to seal a search warrant should notify the District Attorney's Office to obtain a Motion and Order to Seal Search Warrant to be presented to the judge at the time the search warrant is sought.
2. If the judge determines that it is appropriate to seal the search warrant, he shall execute the order. The order should state the length of time for which the search warrant is to be sealed.
3. The Court's copy of the search warrant and application for the search warrant should be placed in an envelope. . . . The envelope and the order sealing the search warrant shall be delivered to the Head of the Criminal Division within the Clerk's office.
4. The Clerk shall establish a log, listing by caption search warrants that have been sealed, the date the order to seal was signed, the date the order expires and the name of the assistant district attorney assigned to the case. The log will be available for public inspection

On 28 July 2008, Plaintiffs filed a motion to vacate the trial court's 16 July 2008 order, sealing the search warrants and related documents, and requesting public access to those documents. On 30 July 2008, Plaintiffs filed a supplement to the motion to unseal search war-

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rants to include the second and third search warrants, filed 21 July 2008 and 25 July 2008 respectively. The trial court denied this motion on 31 July 2008, finding and concluding, in relevant part, that:

In each instance the court concluded by a preponderance of the evidence . . . that immediate release of the information to the public could and would undermine the ongoing investigation and would jeopardize the potential success of the investigation to determine the identity of the perpetrator and to obtain sufficient evidence to convict that perpetrator of this homicide. The court is still of that opinion. . . .

. . . .

The court is the gatekeeper of these interests. . . . (1) The right of the public to the assurance that a homicide investigation will be professionally and properly conducted and that the investigation will not be undermined by the imprudent premature release of information which could jeopardize its success; (2) The right of the public to information concerning the progress of this important homicide investigation; and, (3) The public's right to insure that an accused receives a fair trial.

. . . .

Based upon the information contained in the sealed warrants, the court finds and concludes that the release of this information is premature, since the homicide investigation is ongoing and no perpetrator has been charged. The court finds by a preponderance of the evidence that release of this information today would likely risk and jeopardize the right of the State to prosecute the perpetrator. The court further finds that the release of the information may prevent a person hereafter accused from receiving a fair and impartial trial due to potential hearsay information about the offense that may prejudice the public against the accused.

The trial court continued "the temporary sealing orders in effect for the period set forth in the orders."

On 15 August 2008, the State and the Assistant District Attorney filed motions to extend the sealing of all three search warrants and related documents, on the grounds that "to publicly disclose the search warrant . . . might hamper or impede this ongoing investigation and . . . could adversely affect persons who are not charged with

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committing a crime and materially prejudice further adjudicative proceedings involving this investigation. . . .” On 18 August 2008, the trial court entered an order extending all three search warrants until 2 September 2008, citing the reasons set forth in its 31 July 2008 order.

Plaintiffs appeal from the orders entered by the trial court on 31 July 2008 and 18 August 2008, denying their request to unseal the three search warrants.

Plaintiffs argue that the trial court erred by denying their motions to vacate the sealing orders entered on 16 July, 21 July and 25 July 2008. Plaintiffs contend that the sealing orders should have been vacated based on public records statutes, North Carolina common law, Article I, § 18 of the North Carolina Constitution, and the First Amendment to the United States Constitution. Plaintiffs also argue that the trial court “did not properly apply the legal and constitutional principles and presumptions emanating from these sources.” We disagree and affirm the trial court’s orders.

[1] Although the contents of the sealing orders have been unsealed and released to the public, we hold that this case is not moot. “This case falls within the exception to the mootness rule which permits judicial review when the dispute is ‘capable of repetition, yet evading review.’” *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 63 (4th Cir. 1989) (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515, 55 L. Ed. 310, 316 (1911)). This exception is applicable if “(1) the challenged action is too short in duration to be fully litigated and (2) there is a reasonable expectation that the same party will be subjected to the same action again.” *Id.* (citation omitted). The search warrants and attendant documents were sealed for a thirty day period. “[T]his kind of secrecy order is usually too short in duration to be litigated fully.” *Id.* There is also a reasonable expectation that the issue of a party being denied access to a search warrant and related documents due to a sealing order would be capable of repetition. Therefore, we address the merits of the case.

[2] The present case raises issues about whether the press and public have a right of access to search warrants and related documents in criminal proceedings and the extent of this right. Although the issues in this case have not previously been specifically addressed, *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 515 S.E.2d 675 (1999) and *Baltimore Sun*, 886 F.2d 60 set forth standards

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which guide our analysis. “The judicial officer’s decision to seal . . . is subject to review under an abuse of discretion standard.” *Baltimore Sun*, 866 F.2d at 65.

Plaintiffs first argue that after search warrants are returned by law enforcement agencies to the clerk, they become public records which “must be open to public inspection absent extraordinary circumstances.” “Access to public records in North Carolina is governed generally by our Public Records Act, codified as Chapter 132 of the North Carolina General Statutes. Chapter 132 provides for liberal access to public records.” *Virmani*, 350 N.C. at 462, 515 S.E.2d at 685. “The Public Records Act permits public access to all public records in an agency’s possession ‘unless either the agency or the record is specifically exempted from the statute’s mandate.’” *Gannett Pacific Corp. v. N.C. State Bureau of Investigation*, 164 N.C. App. 154, 156, 595 S.E.2d 162, 164 (2004) (quoting *Times-News Publishing Co. v. State of N.C.*, 124 N.C. App. 175, 177, 476 S.E.2d 450, 452 (1996)).

Under N.C. Gen. Stat. § 132-1 (2007), “ ‘public records’ shall mean all documents, papers, letters . . . regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.” Generally, “[r]ecords of criminal investigations conducted by public law enforcement agencies [and] records of criminal intelligence information compiled by public law enforcement agencies . . . are not public records as defined by G.S. 132-1.” N.C. Gen. Stat. § 132-1.4(a) (2007). However, N.C. Gen. Stat. § 132-1.4(k) (2007) provides that:

[t]he following court records are public records and may be withheld only when sealed by court order: *arrest and search warrants that have been returned by law enforcement agencies*, indictments, criminal summons, and nontestimonial identification orders.

“Absent ‘clear statutory exemption or exception, documents falling within the definition of ‘public records’ in the Public Records Law must be made available for public inspection.’” *Virmani*, 350 N.C. at 462, 515 S.E.2d at 685 (quoting *News & Observer Publ’g Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992)). Therefore, Plaintiff’s general argument is valid in that these types of documents are ordinarily considered public records and are open for the public’s review. However, “even though court records may generally be public records . . . a trial court may, in the proper circumstances, shield por-

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tions of court proceedings and records from the public[.]” *Id.* at 463, 515 S.E.2d at 685 (citations omitted).

“Notwithstanding the broad scope of the public records statute . . . our trial courts always retain the necessary inherent power granted them by Article IV, Section 1 of the North Carolina Constitution to control their proceedings and records in order [to] ensure that each side has a fair and impartial trial.” *Id.* Nonetheless, trial courts should not withhold public records from public inspection unless it “is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial.” *Id.*

In the case before us, the trial court ordered the three search warrants and their attendant papers sealed pursuant to N.C. Gen. Stat. § 132-1.4(k). The trial court also sealed these public records pursuant to N.C. Gen. Stat. § 132-1.4(e), which states that:

[i]f a public law enforcement agency believes that release of information that is a public record under subdivisions (c)(1) through (c)(5) of this section will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation, it may seek an order from a court of competent jurisdiction to prevent disclosure of the information. In such action the law enforcement agency shall have the burden of showing by a preponderance of the evidence that disclosure of the information in question will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation.

The trial court incorrectly applied N.C. Gen. Stat. § 132-1.4(e) to the documents in the present case. The considerations provided for in N.C. Gen. Stat. § 132-1.4(e) refer only to the public records listed under N.C. Gen. Stat. § 132-1.4(c)(1) through (c)(5) and do not include search warrants returned by law enforcement agencies. However, we hold that the trial court did not abuse its discretion by sealing the search warrants and related affidavits. The trial court found that the release of information contained in the search warrants and attendant papers would undermine the ongoing homicide investigation and the potential success of it. In the sealing order, the trial court found that the sealing for a limited time period was necessary to ensure the interests of maintaining the State’s right to prose-

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cute a defendant, of protecting a defendant's right to a fair trial, and preserving the integrity of an ongoing or future investigation. Because the records were sealed pursuant to a court order, exempting them under N.C. Gen. Stat. § 132-1.4(k), Plaintiffs did not have a right of access to the documents. N.C. Gen. Stat. § 132-1.4(k) states that "[t]he following court records are public records and may be withheld only when . . . sealed by a court order: arrest and search warrants that have been returned by law enforcement agencies, indictments, criminal summons, and nontestimonial identification orders." We hold that the trial court did not abuse its discretion. This assignment of error is overruled.

[3] Plaintiffs also assert that the sealing orders violate North Carolina common law on the public's right of access to court records and proceedings. "The Supreme Court has recognized that the press and the public have a common law qualified right of access to judicial records." *Baltimore Sun*, 886 F.2d at 65 (citation omitted). "[U]nder the common law the decision to grant or deny access is 'left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.'" *Id.* at 64 (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 599, 55 L. Ed. 2d 570, 580 (1978)). However, in *Virmani*, the North Carolina Supreme Court has held that:

when the General Assembly, as the policy-making agency of our government, legislates with respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the law of the State. . . . Therefore, [N.C.G.S. § 132- 1.4(k)] supplants any North Carolina common law right of public access to information regarding [arrest and search warrants].

Virmani, 350 N.C. at 473, 515 S.E.2d 691. For the reasons stated above, the trial court did not abuse its discretion in issuing its sealing orders under North Carolina common law.

[4] Plaintiffs argue that the trial court erred when it sealed the search warrants and related documents without properly applying the constitutional principles of the First Amendment of the United States Constitution.

The Court of Appeals for the Fourth Circuit has held that

[t]he test for determining whether a first amendment right of access is available is: 1) "whether the place and process have his-

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torically been open to the press and general public,” and 2) “whether public access plays a significant positive role in the functioning of the particular process in question.”

Baltimore Sun, 886 F.2d at 64 (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10, 92 L. Ed. 2d 1, 10 (1986)). If both of these prongs are met in the affirmative, “then a qualified First Amendment right of public access must be applied.” *Virmani*, 350 N.C. at 479, 515 S.E.2d at 695. However, if either of those questions are answered in the negative, a first amendment right of access does not exist. “A first amendment right of access can be denied only by proof of a ‘compelling governmental interest’ and proof that the denial is ‘narrowly tailored to serve that interest.’” *Baltimore Sun*, 886 F.2d at 64 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 73 L. Ed. 2d 248, 257 (1982)).

The Supreme Court has:

ma[de] clear that criminal proceedings may be closed to the public without violating First Amendment rights only if (1) closure serves a compelling interest; (2) there is a “substantial probability” that, in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect that compelling interest. Moreover, the court may not base its decision on conclusory assertions alone, but must make specific factual findings.

In Re Washington Post Co., 807 F.2d 383, 392 (4th Cir. 1986) (citation omitted).

Search warrants and related documents fail the first prong of the test in *Baltimore Sun* and therefore, Plaintiffs do not have a qualified First Amendment right of access. Historically, the issuance of search warrants has not been open to the press and general public. The Supreme Court has recognized that “the proceeding for issuing a search warrant ‘is necessarily ex parte, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove the evidence.’” *Baltimore Sun*, 886 F.2d at 64 (quoting *Franks v. Delaware*, 438 U.S. 154, 169, 57 L. Ed. 2d 667, 681 (1978)).

“Frequently . . . the warrant papers including supporting affidavits are open for inspection by the press and public in the clerk’s office after the warrant has been executed[,] [b]ut this is not demanded by the [F]irst [A]mendment.” *Baltimore Sun*, 886 F.2d at 64. Although, “[t]he circuits are split on the press’s first amendment right to access

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to search warrant affidavits[, the Fourth Circuit has held, in *Baltimore Sun*,] that the press *does not* have a first amendment right of access to [judicial records, including] an affidavit for a search warrant” *Id.* at 64-65 (emphasis added); see *Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 429 (4th Cir. 2005). Although we are not bound by federal decisions regarding constitutional rights, we find the Fourth Circuit’s reasoning persuasive, holding that Plaintiffs do not have a First Amendment right of access to the sealed documents. We do not agree that the trial court incorrectly applied First Amendment principles to the sealing orders. This assignment of error is overruled.

[5] Plaintiffs also argue that the trial court erred by failing to apply the principles of Article I, § 18 of the North Carolina Constitution (“open courts” provision). Plaintiffs contend that this “open courts” provision creates a qualified right of access to court proceedings and records.

Article I, § 18 of the North Carolina Constitution states, in pertinent part, that “[a]ll courts shall be open.” N.C. Const. art. I, § 18 (2007). The United States Supreme Court has stated that “[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute.” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606, 73 L. Ed. 2d 248, 257 (1982). “[If] the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.” *Id.* at 606-07, 73 L. Ed. 2d at 257 (citations omitted). Just as many cases have established that there is a qualified right of access to criminal trials, we hold that there is also a qualified right of access to records and documents in a criminal proceeding under the “open courts” provision.

The North Carolina Supreme Court, in *Virmani*, recognized that the legislature determined that the right of access to civil proceedings and records by the press and the public was “outweighed by the compelling countervailing governmental interest in protecting the confidentiality of the medical peer review process.” *Virmani*, 350 N.C. at 477, 515 S.E.2d at 693. The court in *Virmani* also acknowledged that the North Carolina legislature, by statute, made medical peer review investigations confidential, excluding them as “public records” as part of public policy. *Id.* Similarly, we hold that the qualified right of access to criminal records is outweighed by the compelling, countervailing governmental interests expressed by the trial court.

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All three sealing orders in this case were issued pursuant to interests in protecting a defendant's right to receive a fair trial, the integrity of a future or ongoing investigation, and the State's right to prosecute a defendant. The trial court, in the 31 July 2008 order, included the following:

“[T]he court shall balance the interests of the public in disclosure against the interests of the law enforcement agency and the alleged victim in withholding the information.” The court must also insure that any person hereafter charged with this crime will not be denied his right to a fair trial resulting from a release of this information.

. . . .

Upon an initial review at the time the warrants were issued, balancing these interests, the court concluded by a preponderance of the evidence that the interest of the law enforcement agency and the District Attorney were those which were most compelling, as well as the right of anyone charged to hereafter receive a fair trial. Upon further review today, the court examining the issue again continues to be of that same opinion.

Therefore, the trial court properly applied the principles laid out in the “open courts” provision of the North Carolina Constitution. This assignment of error is overruled.

We hold that the trial court properly sealed all the search warrants at issue in this case. A motion to seal search warrants and related documents is usually made when the government applies for the warrant. *Baltimore Sun*, 886 F.2d at 65. As stated in the 2008 Administrative order, law enforcement officers may notify the District Attorney's office to obtain a motion and order to seal a search warrant at the time the affidavits and applications for search warrants are submitted to the trial court. However, as in the present case, a trial court judge may issue an *ex parte* sealing order at his discretion.

It is appropriate to seal such documents “when sealing is ‘essential to preserve higher values and is narrowly tailored to serve that interest.’” *Id.* At the time the probable cause affidavits were submitted and search warrants were issued, no suspect had been arrested in connection with Nancy Cooper's homicide. Disclosure of the information contained in the affidavits and search warrants, as

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the trial court included in the order, would have been “premature, since the homicide investigation [was] ongoing and no perpetrator ha[d] been charged.”

If the trial court “decides to close a hearing or seal documents, ‘it must state its reasons on the record, supported by specific findings.’” *In Re Washington Post*, 807 F.2d 383, 391 (4th Cir. 1986) (quoting *Knight Publishing Co.*, 743 F.2d at 234). The trial court “may explicitly adopt the facts that the government presents to justify sealing when the evidence appears creditable. But the decision to seal the papers must be made by the judicial officer[.]” *Baltimore Sun*, 886 F.2d at 65. The United States Supreme Court has “emphasized that the interest to be protected by closing trial proceedings [or sealing search warrants] must ‘be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’” *Id.* at 65 (quoting *Press-Enterprise*, 464 U.S. at 510, 78 L. Ed. 2d at 638. “[C]onclusory assertions are insufficient to allow review; specificity is required.” *Id.* at 66.

The court in *Virmani* deemed that the sealing was necessary because the release of records “could cause harm to plaintiff and defendant and the peer review process if left unsealed in the public record during the course of pending litigation[,]” and deemed this finding sufficiently specific “to allow [the court] to determine whether the trial court’s orders sealing documents and closing court were properly entered to serve a compelling public interest.” *Virmani*, 350 N.C. at 477-78, 515 S.E.2d at 694. The findings in the present case were also sufficiently specific to determine whether the sealing orders served a compelling public interest. Among other findings and conclusions, the trial court found, by a preponderance of the evidence, that:

release of this information today would likely risk and jeopardize the success of the investigation and will likely undermine the investigation and jeopardize the right of the State to prosecute the perpetrator. The court further finds that the release of the information may prevent a person hereafter accused from receiving a fair and impartial trial due to potential hearsay information about the offense that may prejudice the public against the accused.

Before issuing sealing orders, however, the “[trial court] must consider alternatives to sealing the documents.” *Baltimore Sun*, 886 F.2d at 65. Examples of alternatives include “disclosing some of the

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documents or giving access to a redacted version.” *Id.* at 66. In the present case, it was impractical for the trial court to refrain from sealing all the search warrants and related documents or to give a redacted version of each. All the search warrants and attendant documents focused on gaining evidence as to Bradley Cooper, the marital relationship of Bradley Cooper and Nancy Cooper, the sensitive nature of the investigation and the potential for fluidity. The first warrant ordered the search of the shared residence of Bradley Cooper and Nancy Cooper, the person of Bradley Cooper, and the vehicles of Bradley Cooper and Nancy Cooper. The second search warrant ordered the search of the office of Bradley Cooper and the third search warrant permitted the search of Bradley Cooper’s electronics, including computers and hard drives. Revealing a portion or a redacted version of any of these three search warrants would have frustrated the purpose of protecting the interests expressed by the trial court. Because the trial court also limited the sealing orders to thirty days each, we hold that the trial court considered the least restrictive means of keeping the information confidential.

We affirm the trial court’s order, temporarily sealing the search warrants and related documents in the homicide investigation of Nancy Cooper.

For the foregoing reasons, the trial court’s holding is affirmed.

Affirmed.

Judges McGEE and HUNTER, Robert C. concur.

STATE OF NORTH CAROLINA v. STEPHEN JACK STINES, DEFENDANT

No. COA08-1418

(Filed 6 October 2009)

1. Constitutional Law— *ex post facto*—satellite-based monitoring (SBM)

The required enrollment of defendant in a SBM system did not violate the *ex post facto* clauses of the state and federal constitutions.

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**2. Sentencing— satellite-based monitoring (SBM)—notice—
not sufficiently specific**

Defendant was entitled to a new hearing to determine whether he would be required to enroll in a SBM where the notice given to him by the Department of Correction did not specify the applicable category of N.C.G.S. § 14-208.40(a) or give a brief statement of the factual basis for that determination.

Appeal by defendant from order entered 26 June 2008 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 9 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Catherine M. (Katie) Kayser, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

GEER, Judge.

Defendant Stephen Jack Stines, a convicted sex offender, appeals from the trial court's order requiring him to enroll in the State's Satellite-Based Monitoring ("SBM") program. On appeal, defendant primarily contends that the State violated his procedural due process rights by failing to give him sufficient notice in advance of the SBM hearing of the basis for the Department of Correction's preliminary determination that he met the criteria for enrollment in the SBM program. After reviewing the statute at issue, N.C. Gen. Stat. § 14-208.40B (2007), we conclude that the statute itself requires that the Department of Correction notify the offender, in advance of the SBM hearing, of the basis for its determination that the offender falls within one of the categories set out in N.C. Gen. Stat. § 14-208.40(a) (2007), making the offender subject to enrollment in the SBM program. Because defendant, in this case, did not receive such notice, we reverse and remand for a new SBM hearing.

Facts

Defendant was convicted of taking indecent liberties with a child on 4 December 1997 and was sentenced to 17 to 21 months imprisonment. He subsequently pled guilty to another count of taking indecent liberties with a child on 17 May 2004 and was sentenced to 34 to 41 months imprisonment. Defendant was released from prison in January 2007 and placed on post-release supervision for five years.

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In 2007, the General Assembly enacted N.C. Gen. Stat. § 14-208.40A (2007) and N.C. Gen. Stat. § 14-208.40B, which together set out the procedure for determining who is required to enroll in the SBM program. N.C. Gen. Stat. § 14-208.40B applies to offenders, like defendant in this case, who were previously convicted and sentenced without consideration of SBM. Pursuant to that statute, when an offender has been previously convicted and sentenced for a reportable conviction as defined by N.C. Gen. Stat. § 14-208.6(4) (2007), but a court has never determined whether he should be required to enroll in the SBM program, the Department of Correction must make an initial determination as to whether he falls into one of the categories of offenders set out in N.C. Gen. Stat. § 14-208.40(a). N.C. Gen. Stat. § 14-208.40B(b) further provides that if the Department of Correction determines that the offender does fall within N.C. Gen. Stat. § 14-208.40(a), it shall schedule an SBM hearing and shall notify the offender of the Department's determination and the date of the hearing.

On 15 February 2008, defendant received a letter from the Department of Correction informing him that he was to appear for an SBM hearing. The letter notified defendant that "[t]he Department of Correction has made the initial determination that you meet the criteria set out in General Statute 14-208.40(a), which requires your enrollment in Satellite Based Monitoring." The letter did not identify which of the criteria in N.C. Gen. Stat. § 14-208.40(a) the Department had concluded defendant met. After setting out the date, time, and location of the hearing, the letter explained that a trial court would finally decide whether defendant would be required to enroll in the SBM program.

At the hearing in Catawba County Superior Court on 23 June 2008, defendant moved to dismiss the proceedings against him, arguing that the application of the statute to him violated the *ex post facto* clauses of the state and federal constitutions. Defendant also argued that the letter sent to him by the Department of Correction was insufficient notice under the Due Process Clause of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution. The trial court denied defendant's motion to dismiss and found that defendant fell within N.C. Gen. Stat. § 14-208.40(a) because "defendant is a recidivist as that term is defined pursuant to 14-208.2(b) [sic] in that he has two reportable convictions of taking indecent liberties with a minor or with a child." The trial court ordered defendant to enroll in the SBM program for the remainder of his natural life. Defendant timely appealed to this Court.

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Discussion

[1] On appeal, defendant first contends that requiring him to enroll in the SBM program violates the *ex post facto* clauses of the state and federal constitutions. This Court, however, recently rejected this argument in *State v. Bare*, 197 N.C. App. 461, 478, 677 S.E.2d 518, 531 (2009) (holding that retroactive application of SBM program does not violate *ex post facto* clause because program was intended by legislature to be civil, regulatory scheme and its effects are not so punitive as to negate that intent). We, therefore, do not discuss that argument further.

[2] Defendant further contends that his procedural due process rights were violated because the Department's hearing notification letter did not indicate which of the N.C. Gen. Stat. § 14-208.40(a) categories applied to him or explain the basis for that determination. Our appellate courts have held that "[n]o process is due a person who is deprived of an interest by official action unless that interest is protected by law, *i.e.*, unless it is an interest in life, liberty or property." *Henry v. Edmisten*, 315 N.C. 474, 480, 340 S.E.2d 720, 725 (1986). Once a protected life, liberty, or property interest has been demonstrated, the Court "must inquire further and determine exactly what procedure or 'process' is due." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998).

We believe that requiring defendant to submit to SBM implicates a protected liberty interest. Although defendant is on post-release supervision and, accordingly, his liberty is already somewhat restricted, the SBM will continue past the conclusion of his post-release supervision. *See* N.C. Gen. Stat. § 14-208.42 (2007). In addition, if an offender is ordered to enroll in the SBM program, he will be required to have the necessary monitoring equipment attached to his person, and he will be required to cooperate with the Department of Correction and the SBM program's regulations. *Id.* The General Assembly has made it a criminal offense if the offender (1) fails to enroll in the program, (2) intentionally tampers or interferes with the functioning of the SBM device, or (3) fails to cooperate with the Department of Correction guidelines and regulations for the SBM program. N.C. Gen. Stat. § 14-208.44 (2007). The SBM program is required to use a global positioning system ("GPS") that permits time-correlated and continuous tracking of the offender and reporting of the offender's location from a minimum of once a day to a maximum of near real time. N.C. Gen. Stat. § 14-208.40(c).

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Although our courts have not had occasion to address this issue before, in *Commonwealth v. Cory*, 454 Mass. 559, 911 N.E.2d 187 (2009), the Massachusetts Supreme Judicial Court recently discussed whether required participation in SBM infringes upon a protected liberty interest. The court identified two ways in which a GPS device would burden an individual's liberty: "by its permanent, physical attachment to the offender, and by its continuous surveillance of the offender's activities." *Id.* at 570, 911 N.E.2d at 916.

With respect to the first of these, the court reasoned that requiring an individual to permanently attach a GPS device to his or her person would be "dramatically more intrusive and burdensome" than the burden imposed through the State's sex offender registration program. *Id.* The court explained:

There is no context other than punishment in which the State physically attaches an item to a person, without consent and also without consideration of individual circumstances, that must remain attached for a period of years and may not be tampered with or removed on penalty of imprisonment. Such an imposition is a serious, affirmative restraint.

Id. As for the second potential intrusion on liberty, the court maintained:

The intended function of the GPS device, continuous reporting of the offender's location to the probation department, also represents an affirmative burden on liberty. While GPS monitoring does not rise to the same level of intrusive regulation that having a personal guard constantly and physically present would impose, it is certainly far greater than that associated with traditional monitoring. And the impact of such intrusion is of course heightened by the physical attachment of the GPS bracelet, which serves as a continual reminder of the State's oversight.

Id. at 570-71, 911 N.E.2d at 196-97.

The court then concluded that "[t]he GPS requirement thus places significant restraints on offenders" that amount to "liberty burdens." *Id.* at 571, 911 N.E.2d at 197. *See also U.S. v. Smedley*, 611 F. Supp. 2d 971, 975 (E.D. Mo. 2009) (holding that imposing home detention with electronic monitoring as condition of release impinged on liberty interest); *U.S. v. Merritt*, 612 F. Supp. 2d 1074, 1079 (D. Neb. 2009) (holding that "[a] curfew with electronic monitoring restricts the defendant's ability to move about at will and implicates a liberty

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interest protected under the Due Process Clause”); *U.S. v. Arzberger*, 592 F. Supp. 2d 590, 600 (S.D.N.Y. 2008) (recognizing that “the curfew and attendant electronic monitoring here would impinge on a constitutionally-protected liberty interest”).

We agree with the reasoning of the Massachusetts Supreme Judicial Court and hold that requiring enrollment in the SBM program does deprive an offender of a significant liberty interest. We must, therefore, next determine whether defendant, in this case, was given all the process he was due. Our Supreme Court has stressed that “[t]he fundamental premise of procedural due process protection is notice and the opportunity to be heard.” *Peace*, 349 N.C. at 322, 507 S.E.2d at 278. “At a minimum, due process requires adequate notice of the charges and a fair opportunity to meet them, and the particulars of notice and hearing must be tailored to the capacities and circumstances of those who are to be heard.” *In re Lamm*, 116 N.C. App. 382, 386, 448 S.E.2d 125, 128-29 (1994), *aff’d per curiam*, 341 N.C. 196, 458 S.E.2d 921 (1995), *cert. denied*, 516 U.S. 1047, 133 L. Ed. 2d 663, 116 S. Ct. 708 (1996). As there is no contention that defendant was deprived of the opportunity to be heard, the sole issue here is whether the notice given to defendant was sufficient.

The State contends that N.C. Gen. Stat. § 14-208.40B does not require any more notice than it gave defendant. Specifically, the State argues that the only requirement under the statute is that the Department notify the individual that an initial determination has been made that the offender falls within N.C. Gen. Stat. § 14-208.40(a) without need for any specification of which category was determined to apply. We do not believe that this interpretation of N.C. Gen. Stat. § 14-208.40B is consistent with either the statute’s plain language or the due process requirement of notice. “It is a cardinal principle of statutory construction that, where possible, courts will construe statutes to avoid serious doubts about their constitutionality.” *State v. Worthington*, 89 N.C. App. 88, 91, 365 S.E.2d 317, 320, *appeal dismissed*, 322 N.C. 115, 367 S.E.2d 134 (1988). *See also Barringer v. Caldwell County Bd. of Educ.*, 123 N.C. App. 373, 381, 473 S.E.2d 435, 440 (1996) (observing the rule that “statutes are to be construed whenever possible so as to uphold their constitutionality”). Construing N.C. Gen. Stat. § 14-208.40B(b) to allow the degree of notice advocated by the State would likely result in a violation of defendant’s procedural due process rights.

The statute itself requires that the Department of Correction “shall make an initial determination on whether the offender falls

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into one of the categories described in G.S. 14-208.40(a).” N.C. Gen. Stat. § 14-208.40B(a). The statute then further provides:

If the Department determines that the offender falls into one of the categories described in G.S. 14-208.40(a), the Department shall schedule a hearing in the court of the county in which the offender resides. *The Department shall notify the offender of the Department’s determination and the date of the scheduled hearing* by certified mail sent to the address provided by the offender pursuant to G.S. 14-208.7. The hearing shall be scheduled no sooner than 15 days from the date the notification is mailed. Receipt of notification shall be presumed to be the date indicated by the certified mail receipt.

N.C. Gen. Stat. § 14-208.40B(b) (emphasis added). In short, the statute requires that the Department, after making an initial determination that the offender falls into one of the § 14-208.40(a) categories, then notify the individual of that determination and the date of the scheduled hearing.

Thus, the statute requires notice of two facts: (1) the hearing date and (2) the Department’s determination with respect to N.C. Gen. Stat. § 14-208.40(a). As the scheduling of the hearing automatically notifies the individual that the Department has determined he falls into one of the categories of individuals subject to SBM set out in N.C. Gen. Stat. § 14-208.40(a), the State’s interpretation of the statute would render meaningless the statute’s additional requirement that the Department notify the offender of its determination. The scheduling of the hearing would, under the State’s view, do that by itself. Consequently, the General Assembly must have intended that the additional requirement that the Department “notify the offender of the Department’s determination,” N.C. Gen. Stat. § 14-208.40B(b), include notification of the Department’s actual determination—in other words, specification of the category or categories into which the offender falls and the basis for that conclusion.

This construction of the statute is further supported by the fact that the statute allows the hearing to be held in as short a time frame as 15 days after notification of the hearing. While the State points to the fact that counsel in this case had more time, the relevant consideration is the least amount of time that counsel for the offender could have. We do not believe that it is reasonable to assume that the General Assembly intended that counsel for an offender have to investigate and prepare to respond to all possible categories under

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N.C. Gen. Stat. § 14-208.40(a) in a period of time possibly as short as 15 days, especially when the opposition to SBM may require investigation of events occurring years ago.

Moreover, the State's interpretation of N.C. Gen. Stat. § 14-208.40B(b) would give rise to serious questions regarding violation of the offenders' procedural due process rights. In *Wilkinson v. Austin*, 545 U.S. 209, 228-29, 162 L. Ed. 2d 174, 193, 125 S. Ct. 2384, 2397 (2005), the Supreme Court held that the State of Ohio's policy for assigning inmates to its Supermax prison facility was adequate to protect an inmate's procedural due process interests in not being assigned to the Supermax facility because an inmate being considered for placement in the prison must receive notice of the factual basis leading to consideration for such placement and an opportunity for rebuttal. The Court explained that "[o]ur procedural due process cases have consistently observed that these are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Id.* at 226, 162 L. Ed. 2d at 192, 125 S. Ct. at 2396. The Court reasoned that "[r]equiring officials to provide a brief summary of the factual basis for the classification review and allowing the inmate a rebuttal opportunity safeguards against the inmate's being mistaken for another or singled out for insufficient reason." *Id.*

In *Morrissey v. Brewer*, 408 U.S. 471, 486-87, 33 L. Ed. 2d 484, 497, 92 S. Ct. 2593, 2603 (1972), the Supreme Court discussed the degree of notice required for preliminary parole revocation hearings, holding that "the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. *The notice should state what parole violations have been alleged.*" (Emphasis added). For a final parole revocation hearing, the Court held that the "minimum requirements of due process" include "written notice of the claimed violations of parole." *Id.* at 489, 33 L. Ed. 2d at 499, 92 S. Ct. at 2604. Our appellate courts have similarly required notice of the alleged probation violations giving rise to the probation revocation hearing. *See State v. Sellers*, 185 N.C. App. 726, 728, 649 S.E.2d 656, 657 (2007) (explaining that minimum due process requirements in probation revocation hearings include written notice of conditions allegedly violated); *State v. Cunningham*, 63 N.C. App. 470, 475, 305 S.E.2d 193, 196-97 (1983) (holding that evidence was insufficient to support trial court's order revoking defendant's suspended sentence in part because State sought to prove additional conduct not contained in notice to defendant of alleged probation violations).

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Additionally, in a variety of other contexts, North Carolina courts have held that procedural due process requires notice sufficient to inform the recipient in advance of a hearing of the bases for the proceedings against him or her so that the individual will have a meaningful opportunity to respond. *See, e.g., Egelhof ex rel. Red Hat, Inc. v. Szulik*, 193 N.C. App. 612, 616, 668 S.E.2d 367, 370 (2008) (noting that although North Carolina courts have not required “a party, against whom statutory sanctions have been sought, to be put on notice of the specific type of sanctions, which may be ordered,” courts have “consistently required,” as a matter of due process, “(1) notice of the bases of the sanctions and (2) an opportunity to be heard”); *Dunn v. Canoy*, 180 N.C. App. 30, 40, 636 S.E.2d 243, 250 (2006) (holding that “[t]o receive adequate notice, ‘[t]he bases for the sanctions must be alleged. . . . In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him.’ ” (quoting *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 439 (1998))), *appeal dismissed and disc. review denied*, 361 N.C. 351, 645 S.E.2d 766 (2007); *In re Alexander v. Cumberland County Bd. of Educ.*, 171 N.C. App. 649, 658, 615 S.E.2d 408, 415 (2005) (finding no due process violation where student who was suspended for 10 days received notice in advance of hearing of alleged violations); *Owen v. UNC-G Physical Plant*, 121 N.C. App. 682, 686, 468 S.E.2d 813, 816 (explaining that “the federal due process concern for fundamental fairness is satisfied if the employee receives ‘oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story’ ” (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 84 L. Ed. 2d 494, 506, 105 S. Ct. 1487, 1495 (1985))), *disc. review improvidently allowed*, 344 N.C. 731, 477 S.E.2d 33 (1996).

We can conceive of no meaningful distinction between these cases—consistently requiring notice in advance of a hearing of the contentions giving rise to the hearing—from an SBM hearing that could result in an offender, for a substantial period of time, having a GPS device attached to his leg, having his whereabouts constantly monitored, and being required to comply with Department of Correction regulations. The State, in arguing that due process does not require such notice, does not address procedural due process cases such as those above, but instead relies solely on *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305, 121 S. Ct. 1379-80 (2001).

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In *Golphin*, the Court held that the State is not required to set out in a short-form murder indictment the specific aggravating circumstances that it intends to rely upon in seeking the death penalty. *Id.* at 397, 533 S.E.2d at 193-94. The Court reasoned that because N.C. Gen. Stat. § 15A-2000(e) (2007) “sets forth the only aggravating circumstances upon which the State may rely in seeking the death penalty,” the statute is sufficient notice as to what aggravating circumstances the State might use. 352 N.C. at 396, 533 S.E.2d at 193. Here, the State argues, as N.C. Gen. Stat. § 14-208.40(a) “lists only four possible categories under which an offender may qualify for eligibility in the SBM program,” that statute is sufficient notice as to why an offender has been determined to be eligible.

As an initial matter, we note that the Court in *Golphin* did not specifically address the requirements of procedural due process, but rather focused on the ramifications of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), for short-form indictments. Importantly, however, as the Court stressed in *State v. Hunt*, 357 N.C. 257, 265, 582 S.E.2d 593, 599, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702, 124 S. Ct. 43-44 (2003), addressing the same issue, in capital cases there is a “Rule 24 hearing” at which the court and parties “shall” consider “the existence of evidence of aggravating circumstances.” Although the prosecutor is not limited to aggravating factors discussed at the Rule 24 hearing, a capital defendant can also request a pretrial hearing on “the legal sufficiency of a set of facts supporting the aggravating circumstances” set out in the statute. *Id.* at 264, 582 S.E.2d at 598. Of course, defense counsel is also entitled to discovery from the State pursuant to N.C. Gen. Stat. § 15A-903 (2007). Finally, in capital cases such as *Golphin* and *Hunt*, defense counsel is not expected to investigate and prepare to defend the 11 potential statutory aggravators in a matter of weeks, but rather will have more than a year to do so.

We do not believe that *Golphin*—addressing capital cases with their unique protections combined with the discovery available in criminal cases generally—warrants the conclusion that the Department of Correction need not advise an offender of the specifics of its determination that an offender falls within the scope of N.C. Gen. Stat. § 14-208.40(a). An SBM hearing is distinguishable from capital sentencing hearings by virtue of the short time frame prior to the SBM hearing, the potential need to investigate matters occurring years earlier depending on the § 14-208.40(a) category identified, and the lack of any other prehearing means to learn the basis for the Department’s determination.

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We note that with probation revocation hearings, as with SBM hearings, there are only a limited number of possible bases for the revocation hearing because the defendant is already aware of the probation conditions. We nonetheless require notice to the defendant in advance of the hearing of the conditions that the State contends were violated. *See, e.g., Sellers*, 185 N.C. App. at 728, 649 S.E.2d at 657; *Cunningham*, 63 N.C. App. at 475, 305 S.E.2d at 196-97. We believe that the SBM hearing is more analogous to a probation revocation hearing than to a capital sentencing hearing.

The State also argues, citing N.C. Gen. Stat. § 14-208.40A(a), that since the district attorney must present the evidence at the SBM hearing, it follows that the General Assembly did not intend to limit the grounds upon which the district attorney could rely to a ground found initially by the Department of Correction. While N.C. Gen. Stat. § 14-208.40A(a) does specify that the district attorney will conduct the SBM hearing, that section applies only when SBM is being considered *during* a defendant's sentencing hearing. There is no comparable provision in N.C. Gen. Stat. § 14-208.40B, the statute applicable to defendants who have already been sentenced without SBM having been considered.

Moreover, recent amendments to § 14-208.40B have clarified that the hearing will be requested by "the district attorney, *representing the Department*." 2009 N.C. Sess. Laws ch. 387 § 4 (emphasis added). If the district attorney is "representing" the Department, then there is no conflict with the Department of Correction's being required to disclose its initial determination to the offender in its notice of the SBM hearing. Further, the Department could avoid the problem the State raises by consulting with the district attorney when making the initial eligibility determination.

The State has identified no other reason that the Department of Correction should not be required, in its N.C. Gen. Stat. § 14-208.40B(b) notice to the offender, to set out the bases for its determination that the offender falls into one of the § 14-208.40(a) categories. Given the importance of this notice to an offender, the possible lifelong consequences to the offender's liberty resulting from the hearing, and the lack of any significant burden to the State, we decline to construe N.C. Gen. Stat. § 14-208.40B in the manner advocated by the State as it would likely violate the offender's procedural due process rights. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35, 47 L. Ed. 2d 18, 33, 96 S. Ct. 893, 903 (1976) (holding that test for determining amount of process that is due requires weighing

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private interest affected by official action, the risk of erroneous deprivation of interest through procedures used, probable value of additional or substitute procedural safeguards, and government's interest, including burdens that additional procedural requirement would entail).

We, therefore, hold that N.C. Gen. Stat. § 14-208.40B(b)'s requirement that the Department "notify the offender of [its] determination" mandates that the Department, in its notice, specify the category set out in N.C. Gen. Stat. § 14-208.40(a) into which the Department has determined the offender falls and briefly state the factual basis for that conclusion. As the Department's letter to defendant did not provide this information, we must reverse and remand for a new SBM hearing.

Reversed and remanded.

Judges BRYANT and STEPHENS concur.

STATE OF NORTH CAROLINA v. RICKY SYLVESTER GRAHAM

No. COA09-135

(Filed 6 October 2009)

1. Evidence— prior crimes or bad acts—assaults—admissible

Evidence of defendant's prior assaults against the victim was probative of defendant's motive, malice, hatred, ill-will, and intent, and was admissible.

2. Evidence— prior crimes or bad acts—assault—probative and not prejudicial

There was no abuse of discretion in admitting evidence of a prior assault against the victim in a first-degree murder prosecution. The prior assault was highly probative and the evidence against defendant was overwhelming.

3. Criminal Law— lost evidence—motion for sanctions

There was no abuse of discretion in the trial court denying a first-degree murder defendant's motion for sanctions after the State lost defendant's impounded car, and in allowing the State to admit evidence about soil taken from the car. There was no show-

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ing of bad faith, defendant had access to the soil samples, he presented evidence from his own expert, and he was able to tell the jury that the police department had lost his car.

4. Criminal Law— prosecutor’s arguments—not a comment on failure to testify

The trial court did not err in a first-degree murder prosecution by not intervening *ex mero motu* to exclude comments by the prosecutor during closing arguments which defendant contended referred to his failure to testify. The remarks were permissible comments on defendant’s failure to produce witnesses or evidence to contradict the State’s evidence.

5. Constitutional Law— effective assistance of counsel—delay in indictment and appointing counsel

Defendant’s ineffective assistance of counsel argument was better addressed as a claim of prejudice from pre-indictment delay where he argued that delaying indictment prevented the appointment of counsel which led to hardship in preparing his defense.

6. Constitutional Law— effective assistance of counsel—speedy trial motion

There was no effective assistance of counsel violation where defendant argued that his counsel’s failure to make a speedy trial motion was deficient performance, but defendant was represented by counsel when his *pro se* motions to dismiss were heard. Defendant has not shown that counsel’s failure to move for dismissal on speedy trial grounds was prejudicial.

7. Constitutional Law— due process—pre-indictment delay—prejudice—allegation not specific

Defendant did not show a violation of his due process rights from a pre-indictment delay where he asserted only that the length of the delay in indicting him created a reasonable possibility of prejudice.

8. Appeal and Error— preservation of issues—briefs—failure to set out authority or argument

An issue concerning the standard of review for pre-indictment delay claims was not properly before the appellate court where defendant failed to set out authority or argument on the issue.

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Appeal by defendant from judgments entered 5 October 2007 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 September 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Jonathan Babb, for the State.

Michael E. Casterline for defendant.

BRYANT, Judge.

On 10 March 2003, defendant Ricky Sylvester Graham was indicted on two counts of first-degree murder. Following superseding indictments issued on 19 February 2007, defendant was tried capitally at the 27 September 2007 session of the Mecklenburg County Superior Court. The jury found defendant guilty on both counts on the bases of felony murder and of malice, premeditation and deliberation. After a capital sentencing proceeding, defendant was sentenced to two consecutive terms of life imprisonment without the possibility of parole. Defendant appeals. As discussed below, we find no error.

Facts

At trial, the evidence tended to show the following. Defendant was the estranged husband of victim Tracy Coleman and the father of victim Rishia Graham. Defendant assaulted Coleman in her home on 5 June 1995 and was later indicted for assault with a deadly weapon with intent to kill inflicting serious injury. Thereafter, defendant was overheard threatening Coleman and urging her to leave the state so she could not testify against him. Defendant also asked a friend who worked as a domestic violence investigator with the police department whether an assault case could go forward if the victim was unavailable to testify. On 20 May 1996, shortly before the assault trial was to begin, Coleman and Rishia went missing. On that day, defendant was seen by one witness carrying a shovel and bucket near a lake off Whippoorwill Drive. On 31 May 1996, the bodies of Coleman and Rishia were discovered buried near the lake off Whippoorwill Drive. In June 1996, defendant was convicted of assaulting Coleman and sentenced to 108-139 months in prison.

Murder charges were first filed against defendant in August 2001. The initial charges were dismissed and defendant was not re-indicted until March 2003. In July 2004, defendant filed two *pro se* “Motion[s] for Quick and Speedy Trial/Motion[s] for Progress of My Attorney”

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with the senior resident superior court judge. In August 2004, he filed a *pro se* “Request for Trial of [C]onfined [D]efendant.” At a September 2004 hearing, defendant’s counsel indicated that they would not be ready for trial until late 2005 and defendant asked that they be replaced. The court removed original counsel and appointed two new attorneys to represent defendant in October 2004. In January 2005, defendant filed an “Order to Dismiss With Prejudice for Denial of a Speedy Trial” for which the court held a hearing in April 2005. The court denied defendant’s *de facto* motion for a speedy trial, focusing on the two-year delay since the indictment and concluding that although there had been a delay in bringing the case to trial, it was not the fault of the State and that defendant’s ability to present his defense had not been impaired. The court did not specifically address the pre-indictment delay. Defendant’s trial began two years later in 2007, some eleven years after the crimes took place.

Defendant made thirty-seven assignments of error, five of which he brings forward in four arguments to this Court: the trial court erred (I) by admitting Rule 404(b) evidence of the 1995 assault on Tracy Coleman; (II) by allowing testimony about defendant’s car which was lost by the State before trial; (III) by failing to intervene *ex mero motu* after certain comments by the prosecutor at closing; and (IV) in not dismissing the case because the long delay in indicting him and bringing the case to trial prejudiced his right to effective assistance of counsel and to prepare a defense.

I

[1] Defendant first argues that the trial court’s decision to admit Rule 404(b) evidence about defendant’s 1995 assault on Coleman unfairly prejudiced him in violation of Rule 403. We disagree.

“Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court.” *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990) (citations omitted). An abuse of discretion is shown where the court’s ruling is “manifestly unsupported by reason.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). “Evidence which is probative of the State’s case necessarily will have a prejudicial effect upon the defendant; the question is one of degree.” *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. In the context of showing an abuse of discretion by the trial court in its Rule 403 ruling, a defendant must demonstrate a reasonable possibility that, but for the admission of this evidence, the jury would have reached a dif-

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ferent result. *State v. Hennis*, 323 N.C. 279, 287, 372 S.E.2d 523, 528 (1988). Thus, we will reverse only upon a clear showing that the trial court abused its discretion in admitting this evidence and that the admitted evidence prejudiced defendant.

The trial court admitted evidence of the 1995 assault under Rule of Evidence 404(b), which provides in pertinent part

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. 8C-1, Rule 404(b) (2007). Rule 404(b) “is a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54 (emphasis in original).

“[E]vidence of a defendant’s prior assaults on the victim for whose murder the defendant is being tried is admissible for the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim under N.C.G.S. § 8C-1, Rule 404(b).” *State v. Gary*, 348 N.C. 510, 520, 501 S.E.2d 57, 64 (1998) (citation omitted). In addition, where one of the State’s theories is that the victim was killed to prevent his testifying against defendant on a prior offense, evidence of the prior crime is admissible to prove motive. *State v. Adcox*, 303 N.C. 133, 138-39, 277 S.E.2d 398, 401-02 (1981). Here, the trial court admitted evidence of the 1995 assault for the purposes of showing motive, malice, hatred, ill-will and intent. As discussed above, this evidence had probative value for all of these purposes and was properly admissible.

[2] Defendant contends that the evidence admitted was of limited probative value which was outweighed by the high likelihood of unfair prejudice to him. After a careful review of the record, we see no abuse of discretion. In the cases cited by defendant where appellate courts have found prejudicial error under Rule 403, the admitted evidence was of little or no probative value. See *Hennis*, 323 N.C. at 286, 372 S.E.2d at 527-28 (finding an abuse of discretion where admit-

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ted crime scene and autopsy photos had no probative value); *State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 825 (1988) (finding an abuse of discretion where the “probative impact has been so attenuated by time that it has become little more than character evidence illustrating the predisposition of the accused”); *State v. Kimbrell*, 320 N.C. 762, 767-69, 360 S.E.2d 691, 694-95 (1987) (finding an abuse of discretion where the State was permitted to question a witness about devil worship by defendant unrelated to the crime charged). Here, in contrast, the evidence of the 1995 assault was highly probative. Further, the evidence against defendant was overwhelming: he tried to persuade Coleman to go to Hawaii before the assault trial; he was heard yelling at Coleman that “he would kill her first” before she could testify against him; he was placed at the scene where the bodies were recovered by an eyewitness; he possessed a weapon of the type used in the murders; and he gave conflicting accounts of his whereabouts around the time of the murders. We conclude there was not a reasonable possibility that, but for the admission of this evidence, the jury would have reached a different result. These assignments error are overruled.

II

[3] Defendant next argues that the trial court erred in allowing testimony about his car when it was lost before trial. We disagree.

“While the trial court has the authority to impose discovery violation sanctions, it is not required to do so. Therefore, whether sanctions are imposed is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion.” *State v. Moore*, 152 N.C. App. 156, 161, 566 S.E.2d 713, 716 (2002) (citations omitted). “[The] discretionary rulings of the trial court will not be disturbed on the issue of failure to make discovery absent a showing of bad faith by the state in its noncompliance with the discovery requirements.” *State v. McClintick*, 315 N.C. 649, 662, 340 S.E.2d 41, 49 (1986). “[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *State v. Mlo*, 335 N.C. 353, 373, 440 S.E.2d 98, 108 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58, 102 L. Ed. 2d 281, 289 (1988), *reh’g denied*, 488 U.S. 1051, 102 L. Ed. 2d 1007 (1989)), *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841 (1994).

In *Mlo*, we addressed a defendant’s contention that his rights to due process under the Fourteenth Amendment to the United States

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Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution were violated when the State improperly relinquished the victim's car such that it was unavailable to the defendant. *Id.* at 371-72, 440 S.E.2d at 106-07. The defendant contended that he could have made plaster casts of the car's tires to see whether they matched tire prints at a crime scene. *Id.* at 372, 440 S.E.2d at 107. Our Supreme Court held that because "[t]he exculpatory value of any tests defendant wished to perform on the automobile was speculative at best[,]" there was no denial of due process and no error. *Id.* at 373, 440 S.E.2d at 108.

Here, defendant's car was impounded by police in 1996 during the investigation of the murders. The car was subsequently lost, and at trial the State acknowledged that it had not been located since 2000. However, the State did preserve soil samples taken from the car. The defense moved for sanctions pursuant to N.C. Gen. Stat. §§ 15-11.1 and 15A-903, seeking to bar admission of the State's forensic evidence from the car. The trial court denied defendant's motion and the State introduced evidence suggesting the soil from defendant's car matched soil from the location where the victim's bodies were buried. Defendant had access to these samples and presented evidence from an expert witness that soil from the car was not a unique match to the soil at the scene of the victims' burials. Defendant was also able to inform the jury that the police department had lost the car prior to trial.

We find no abuse of discretion in the trial court's denial of defendant's motion for sanctions. Defendant has not shown bad faith on the part of the State in losing the car, and defendant was able to test the soil samples collected from the car and present exculpatory evidence at trial to rebut the State's evidence, as well as to impeach the police department's credibility and competence. This argument is overruled.

III

[4] Defendant also argues the trial court erred by failing to intervene *ex mero motu* to exclude comments made by the prosecutor during closing arguments. We find no error.

Under the applicable standard of review, a defendant bears a heavy burden to show reversible error in this context:

A defendant who fails to interpose an objection at trial to statements made by the prosecutor must demonstrate on appeal "that

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the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*.” *State v. Mitchell*, 353 N.C. 309, 324, 543 S.E.2d 830, 839 (2001). “To establish such an abuse, defendant must show that the prosecutor’s comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.” *Id.* (quoting *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999)). Furthermore, “the comments must be viewed in the context in which they were made and in light of the overall factual circumstances to which they referred.” *State v. Call*, 349 N.C. 382, 420, 508 S.E.2d 496, 519 (1998).

State v. Ward, 354 N.C. 231, 250, 555 S.E.2d 251, 264 (2001).

Defendants in criminal prosecutions cannot be compelled to give self-incriminating evidence. U.S. Const. amend. V; N.C. Const. art. I, § 23; *see also* N.C. Gen. Stat. § 8-54 (2009). Thus, “a prosecution’s argument which clearly suggests that a defendant has failed to testify is error.” *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993). “[T]he purpose behind the rule prohibiting comment on the failure to testify is that extended reference by the court or counsel concerning this would nullify the policy that failure to testify should not create a presumption against the defendant.” *State v. Randolph*, 312 N.C. 198, 206, 321 S.E.2d 864, 869 (1984) (citation omitted). However, “[t]he prosecution may comment on a defendant’s failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State.” *Reid*, 334 N.C. at 555, 434 S.E.2d at 196.

On appeal, defendant challenges the following comments by the prosecutor at closing:

Then I’m going to move on and talk about things that [defendant] did, that man over there, that are inconsistent with what an innocent man would have done.

Ask yourself, what would an innocent man do if he found out that people that he cared about were missing, and then found out they had been brutally murdered and put into shallow graves? What would they [sic] do? What could a man do that would be consistent with his innocence? Well, when they go missing, he could show concern, like James Kelly did.

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An innocent person would try to help locate Tracy and Risha when they went missing When the police ask James Kelly to do something, he does it 15 minutes after he's asked That's what an innocent man does. An innocent man, I contend . . . would cooperate with the police.

[T]he defense wants to attack Mr. Kelly, the man that came into this courtroom and answered the questions that were put to him by the State and the defense But you know who [Mr. Kelly] is. Because you had an opportunity to look at him. Look at him in the eye.

Well somebody dug the hole. Somebody who can't account for his whereabouts, on at least a portion of Sunday, May 19th, and most of May 20th, 1996.

Patricia [Cervantes] cooperated with the police. She didn't have anything to hide.

Remember please, that the defendant chose to put on evidence. If there was really a question about those phone calls, they could have called whoever's name was on these phone records, but they didn't. And that tells you something.

If they were so worried about his [the witness who saw defendant near the burial site] friend . . . why didn't [the defense] put [the friend] up. They put on evidence.

Defendant contends that these remarks constitute direct reference to his failure to testify and required a curative instruction from the trial court. He relies on two cases in which the defendants were granted new trials after trial courts failed to intervene *ex mero motu* following improper comments by prosecutors. We conclude that each case is readily distinguishable. In *Ward*, the prosecutor made the following comments:

He started out that he was with his wife and child or wife and children or something that morning. We know he could talk, but

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he decided just to sit quietly. He didn't want to say anything that would "incriminate himself." So he appreciated the criminality of his conduct all right.

He was mighty careful with who [sic] he would discuss that criminality, wasn't he? He wouldn't discuss it with the people at Dix.

Ward, 354 N.C. at 266, 555 S.E.2d at 273. In granting a new trial, the Supreme Court concluded that "the prosecutor impermissibly commented on defendant's silence in violation of his rights under the state and federal Constitutions." *Id.*

In *State v. Shores*, 155 N.C. App. 342, 345, 573 S.E.2d 237, 239 (2002), *disc. review denied*, 356 N.C. 690, 578 S.E.2d 592 (2003), the defendant, charged with murder, had given a brief account of the shooting immediately after his arrest, but then exercised his right to remain silent until trial. On direct examination, the defendant gave a fuller, exculpatory account of the killing, stating that the victim had attacked and threatened him. *Id.* at 346, 573 S.E.2d at 239. "During cross-examination, the State's attorney repeatedly questioned defendant about whether he had ever informed law enforcement that [the victim] kicked him out the front door of the lounge and threatened to kill him." *Id.* We granted a new trial because the repeated questions by the prosecutor

attacked defendant's exercise of his right against self-incrimination in such a manner as to leave a strong inference with the jury that part of defendant's testimony was an after-the-fact creation. Defendant's testimony about Shore's threat was crucial to his defense which centered on self-defense and heat of passion. It seems probable that the State's questions and its closing argument contributed to his conviction.

Id. at 352, 573 S.E.2d at 242.

Here, defendant argued in closing that either James Kelly or Patricia Cervantes had actually committed the murders. The prosecutor's comments, unlike those in *Ward* and *Shores*, did not refer directly to defendant's post-arrest silence or even to his decision not to testify at trial. Rather, the prosecution responded to defendant's attacks on Kelly and Cervantes and made permissible comments on "defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State." *Reid*, 334 N.C. at 555, 434 S.E.2d at 196. The trial court did not err in failing to intervene *ex mero motu*.

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IV

In his final argument, defendant contends that the murder charges against him should have been dismissed because the delays in his indictment and trial denied him effective assistance of counsel and prejudiced his right to prepare a defense. We disagree.

The standard of review for alleged violations of constitutional rights is *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007). Once error is shown, the State bears the burden of proving the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2009).

Defendant's second assignment of error, the basis for and caption of his fourth argument, states: "The case should have been dismissed because the long delay in charging the defendant and bringing the matter to trial prejudiced the defendant's right to effective assistance of counsel and to prepare a defense." This single assignment of error actually encompasses three distinct issues: ineffective assistance of counsel, pre-indictment delay, and post-indictment delay. In his brief, defendant does not distinguish these issues, but rather intertwines his case analysis and factual contentions. Because each of these claims implicates a different constitutional right and requires a different analysis, we address them separately.

Ineffective Assistance of Counsel Claim

[5] As defendant notes, successful ineffective assistance of counsel ("IAC") claims require a showing that: 1) trial counsel's performance was deficient, and 2) the deficient performance prejudiced defendant. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citation omitted). In his brief, defendant asserts that the delay in his indictment prevented him from having counsel appointed which in turn led to hardship in preparing his defense. This argument is not an IAC claim because defendant cannot show deficient performance where he had no counsel to perform at all. Instead, this portion of defendant's argument is better addressed as a claim of prejudice related to pre-indictment delay.

[6] Defendant also contends that once he was indicted and trial counsel were appointed, counsels' failure to make a speedy trial motion constituted deficient performance which prejudiced him. However, in April 2005, defendant was represented by counsel at the trial court's hearing on his *pro se* motions to dismiss. The trial court subsequently denied the motions. Defendant does not explain how having his coun-

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sel make the same motion would have changed the outcome of either the motion hearing or his trial. Thus, defendant has failed to show that trial counsel's failure to move for dismissal on speedy trial grounds prejudiced him. *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248. This assignment of error is overruled.

Pre-indictment Delay Claim

[7] “[T]he Speedy Trial Clause of the Sixth Amendment . . . applie[s] only to delay following indictment, information or arrest.” *State v. Davis*, 46 N.C. App. 778, 781, 266 S.E.2d 20, 22, *disc. review denied*, 301 N.C. 97, S.E.2d (1980). Pre-indictment delays are reviewed for violation of the due process under the Fifth and Fourteenth Amendments. *Id.* To prevail, a defendant “must show both actual and substantial prejudice from the pre-indictment delay *and* that the delay was intentional on the part of the state in order to impair defendant’s ability to defend himself or to gain tactical advantage over the defendant.” *Id.* at 782, 266 S.E.2d at 23 (emphasis in original) (citing *United States v. Lovasco*, 431 U.S. 783, 790, 52 L. Ed. 2d 752, 759, *reh’g denied*, 434 U.S. 881, 54 L. Ed. 2d 164 (1977)). Having carefully reviewed the record and considered defendant’s arguments, we hold that he has failed to show actual prejudice under the first prong of the *Davis* test.

Defendant asserts that the length of delay in indicting him “created a reasonable possibility of prejudice.”¹ However, defendant must show more than “a reasonable possibility of prejudice;” he must show *actual* prejudice. *Id.* at 782, 266 S.E.2d at 23. Defendant alleges that the delay rendered him “unable to fully and thoroughly investigate the facts while evidence was readily available.” He further states that the State lost his car, one witness died and other witnesses “could not recall facts clearly and may have forgotten details” beneficial to him.

A general allegation of prejudice supported merely by claims of faded memory will not sustain the defendant’s burden of proof on the issue of prejudice. The defendant must show that the evidence or testimony lost because of faded memory would have

1. Defendant takes this language from *State v. Johnson*, 275 N.C. 264, 277, 167 S.E.2d 274, 278-79 (1969). We note that in *Johnson*, which was decided prior to *Lovasco* and *Davis*, the Court relied on speedy trial cases and considered the facts under a Sixth Amendment analysis. *Id.* at 270-72, 167 S.E.2d at 279. However, as discussed above, the United States and North Carolina Supreme Courts have since clarified and distinguished constitutional claims arising from pre-and post-indictment delays. *See Davis*, 46 N.C. App. at 781, 266 S.E.2d at 22.

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been helpful, was significant and was lost because of pre-indictment delay.

State v. Holmes, 59 N.C. App. 79, 82, 296 S.E.2d 1, 2 (1982) (citing *State v. Dietz*, 289 N.C. 488, 493, 223 S.E.2d 357, 360 (1976)). Defendant's general assertions do not show actual prejudice—that defendant would have been acquitted but for the delay in the indictment. As discussed previously, although his car was lost, defendant was still able to test the soil samples taken from it. In addition, defendant makes no claim that any particular witness might have given specific testimony which was significant and helpful to him. Thus, defendant has not shown actual prejudice in the pre-indictment delay and, in turn, fails to show any violation of his due process rights.

Post-Indictment Delay Claim

[8] Defendant's second assignment of error mentions "delay . . . in bringing the matter to trial" and his brief cites the standard of review for post-indictment delay claims. However, he fails to set out any authority or argument on this issue, confining his discussion to the pre-indictment delay. This issue is not properly before us.

No error.

Chief Judge MARTIN and Judge HUNTER, Robert C., concur.

STATE OF NORTH CAROLINA v. JOSHUA EARL ANDERSON

No. COA09-220

(Filed 6 October 2009)

1. Evidence— demonstration—shaken baby syndrome

The trial court did not err in a felonious child abuse inflicting serious bodily injury and second-degree murder case by admitting a shaken baby syndrome demonstration because the demonstration was relevant to defendant's intent to harm the child, was not misleading to the jury, and was not unfairly prejudicial.

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2. Criminal Law— prosecutor’s arguments—failure to present mental health evidence or mental health defense—failure to present accident defense

The trial court did not err in a felonious child abuse inflicting serious bodily injury and second-degree murder case by overruling defendant’s objections to the prosecutor’s closing arguments. The prosecutor commented on the lack of evidence supporting the forecast of evidence by defense counsel in the opening statement and did not comment on defendant’s failure to testify.

3. Sentencing— failure to conduct separate proceeding for aggravating factors—abuse of discretion standard

The trial court did not abuse its discretion in a felonious child abuse inflicting serious bodily injury and second-degree murder case by failing to hold a separate sentencing proceeding for aggravating factors because the plain language of N.C.G.S. § 15A-1340.16(a1) vested the trial court with discretion to bifurcate the felony offense proceeding from the aggravating factor determination.

Appeal by defendant from judgment entered 5 September 2008 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 2 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General LaToya B. Powell, for the State.

Randolph & Fischer by J. Clark Fischer, for defendant-appellant.

STEELMAN, Judge.

The trial court did not err by admitting a demonstration when the State established the relevancy of the demonstration with a proper foundation. Prosecutors are permitted in closing argument to point out the lack of evidence supporting the forecast of evidence made by defendant’s counsel in opening statement. The State’s argument that certain issues were not contained in the trial court’s instructions was not a comment upon defendant’s decision not to testify. Under the North Carolina Structured Sentencing Act, the decision not to hold a separate proceeding for aggravating factors is vested in the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion.

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I. Factual and Procedural Background

On 17 February 2005, J.S. was born in Forsyth County, North Carolina to Nikki Shepard (Shepard) and Joshua Earl Anderson (defendant), who were both sixteen years old. Shepard and J.S. lived with Shepard's mother until 12 June 2006 when they moved into the home of defendant's mother. Shepard wanted defendant to spend more time with their son because he had only seen J.S. five or six times in the first fifteen months of his life. After the move, defendant told Shepard she was too soft on J.S. because she did not spank or discipline him.

Defendant slept in one bedroom, and Shepard and J.S. slept in another. On 18 June 2006 at approximately 10:00 p.m., Shepard took J.S. into defendant's room to sleep because she could not get him to stop crying. Shepard did not see J.S. until briefly the next morning. On the morning of 19 June 2006, defendant told Shepard he was going to give J.S. a bath, and she went downstairs to wash her clothes. While downstairs, she heard J.S. let out "a little cry," and rushed upstairs to peep into the bathroom. Shepard saw defendant standing over J.S. giving him a bath, and she thought nothing was wrong.

Minutes later, defendant called Shepard into the bathroom and asked her "has [J.S.] ever done this before?" J.S. had his hands above his head and was shaking as if he was having a seizure, and Shepard responded, "No." Shepard immediately called 911.

Emergency personnel rushed J.S. to the ambulance. As Shepard followed behind them, she asked defendant "ain't you going to come?" to which he responded, "No." Defendant did not ride with Shepard and J.S. to the hospital. While in the ambulance, Shepard noticed J.S.'s body was swollen.

Upon arrival to the emergency room, J.S. was in cardiac arrest, he was not breathing, and he was comatose. Emergency doctors resuscitated J.S. and then inserted a breathing tube. Once stabilized, J.S. was transferred to the pediatric intensive care unit at Brenner Children's Hospital, under the care of Dr. Thomas Nakagawa. Dr. Nakagawa examined the results of an X-ray and a Computer Axial Tomography (CAT scan) to identify why J.S. had been in cardiac arrest. The CAT scan revealed J.S. had a parietal hematoma, or a collection of blood underneath his skin, blood over the surface of his brain, and a skull fracture. The X-ray revealed J.S. had a fracture on his left arm near the wrist. J.S. also had a bruise on his forehead and

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retinal hemorrhages in both of his eyes. After J.S. was treated in the emergency room, he was then moved to a room in the pediatric intensive care unit of the hospital.

At some point, defendant came to the hospital with his family, but was neither crying nor upset. Defendant recounted the events of the morning for Dr. Nakagawa. Defendant said he gave J.S. a fifteen-minute bath around 8:45 a.m. that morning. During the bath, he left J.S. sitting in eight inches of water for about two seconds. While away from the bathroom, defendant heard a cry and came back to find J.S. standing up in the tub. He took J.S. out of the bathtub and began to put baby lotion on him, when he started having a seizure. Defendant explained to police he “was giving J[.S.] a bath, and J[.S.] slipped out of his hands.” After defendant was arrested for felony child abuse inflicting serious injuries, he told the magistrate “he just kept crying, I just got frustrated.”

J.S. remained in the pediatric intensive care unit of the hospital for two weeks, until Shepard made the decision to remove life support. On 30 June 2006, J.S. died at the age of sixteen months.

On 3 July 2006, Doctor Ellen Reimer performed an autopsy on J.S. At the time of death, J.S. weighed approximately twenty-three pounds and was about thirty-four inches tall. An external examination revealed a number of injuries to the head and left arm. An internal examination revealed multiple bruises underneath J.S.’s scalp, which were the result of three different areas of impact to the head. One was a fracture to the right parietal bone of the skull approximately two to two-and-a-half inches in length. The cumulative effect of the impacts caused a significant amount of swelling to the brain resulting in additional fractures to the skull. The swelling also caused global hypoxic ischemic injury, or a lack of oxygen flowing to the brain. This lack of oxygen caused irreversible brain damage. Dr. Reimer further discovered a contusion to the front left side of the brain, which resulted from the brain colliding with the skull. All of the injuries to J.S.’s head occurred at the same time. The autopsy concluded that the proximate cause of death was blunt force trauma to the head.

On 4 June 2007, defendant was charged with felonious child abuse inflicting serious bodily injury. This indictment further alleged the aggravating factor that the crime was especially heinous, atrocious, and cruel. On 14 April 2008, defendant was charged with first-degree murder. The murder indictment alleged the aggravating factors that the crime was especially heinous, atrocious, and cruel,

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and that the victim was very young. The cases went to trial on 2 September 2008.

On 5 September 2008, the jury found defendant guilty of felonious child abuse inflicting serious bodily injury and second-degree murder. The jury also found all of the aggravating factors that were alleged in the indictments. Defendant was sentenced to an active term of 125 to 159 months for the felonious child abuse charge, and a consecutive term of 237 to 294 months for the second-degree murder charge. Defendant appeals.

II. Admission of Shaken Baby Syndrome Demonstration

[1] In his first argument, defendant contends that the trial court erred by admitting the shaken baby syndrome demonstration because the demonstration was irrelevant, misleading, and unfairly prejudicial. We disagree.

A. Demonstration Was Relevant

Defendant first asserts that the trial court erred by admitting the shaken baby syndrome demonstration without proper foundation, and that the demonstration was irrelevant.

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2007). “[E]ven though a trial court’s rulings on relevancy technically are not discretionary . . . such rulings are give great deference on appeal.” *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *appeal dismissed and disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). “The burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission.” *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) (citation omitted).

The shaken baby syndrome demonstration was relevant. Defendant was charged with felonious child abuse inflicting serious injury and first-degree murder. Defendant’s intent to physically harm J.S. was a key element to the jury’s determination of this case. *See* N.C. Gen. Stat. §§ 14-17, 14-318.4(a3) (2007). The severity of J.S.’s injuries and how the injuries were inflicted made it more probable defendant intended to harm J.S. A demonstration for the jury of how these injuries were inflicted was relevant to defendant’s intent to harm J.S.

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The State established the relevancy of this demonstration with a proper foundation. Dr. Reimer, an expert in forensic pathology, performed the autopsy on J.S. She testified that there were multiple bruises to the underside of the scalp located in three different areas, a fracture to the skull, and a contusion on J.S.'s brain. She further testified that these injuries required blunt force trauma to multiple areas of the head, and the spectrum of injuries was not the result of any accident. Doctor Thomas Nakagawa testified as an expert in the areas of intensive care for children and abusive head trauma. Based on his examination of J.S. and the medical records, Dr. Nakagawa opined that J.S. suffered from shaken baby syndrome, and also suffered an impact injury to the head. Dr. Nakagawa used a toy doll to illustrate for the jury how shaken baby syndrome would occur, and the amount of force necessary to cause the kind of injuries suffered by J.S. The State laid a proper foundation for the relevancy of this demonstration. Thus, the trial court did not err by admitting the shaken baby syndrome demonstration. Because defendant fails to show error, we do not examine whether he was prejudiced by its admission.

B. Demonstration Was Not Misleading or Unfairly Prejudicial

Second, defendant asserts that even assuming *arguendo* the demonstration was relevant, it should still have been excluded because it was both misleading and unfairly prejudicial.

If relevant, a demonstration is admissible when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (2007). Under Rule 403, the decision whether to admit or exclude relevant evidence is within the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). " 'A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.' " *State v. Mickey*, 347 N.C. 508, 518, 495 S.E.2d 669, 676 (1998) (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)), *cert. denied*, 525 U.S. 853, 142 L. Ed. 2d 106 (1998).

Defendant argues that the demonstration was misleading to the jury because it was not substantially similar to the manner in which J.S. had been injured. This argument fails to recognize the distinction between an experiment and a demonstration.

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An experiment is defined as “a test made to demonstrate a known truth, to examine the validity of a hypothesis, or to determine the efficacy of something previously untried.” *State v. Hunt*, 80 N.C. App. 190, 193, 341 S.E.2d 350, 353 (1986). “Experimental evidence is competent and admissible if the experiment is carried out under substantially similar circumstances to those which surrounded the original occurrence.” *State v. Locklear*, 349 N.C. 118, 147, 505 S.E.2d 277, 294 (1998) (citations omitted), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). On the other hand, a demonstration is defined as “an illustration or explanation, as of a theory or product, by exemplification or practical application.” *Hunt*, 80 N.C. App. at 193, 341 S.E.2d at 353.

Dr. Nakagawa performed a demonstration for the jury to illustrate shaken baby syndrome. This demonstration was not an experiment to prove that J.S. suffered from shaken baby syndrome; thus, requiring substantially similar circumstances to test the validity of such a hypothesis. Rather, Dr. Nakagawa had already given his expert opinion that, based on his examination of J.S., he suffered from shaken baby syndrome. The demonstration illustrated his testimony regarding the kind of movement and amount of force necessary to inflict the type of injuries J.S. suffered. This illustration enabled the jury to better understand his testimony and to realize completely its cogency and force. See *Williams v. Bethany Fire Dept.*, 307 N.C. 430, 434, 298 S.E.2d 352, 354 (1983) (citation omitted); *State v. Witherspoon*, — N.C. App. —, —, S.E.2d —, (2009). The demonstration was not misleading to the jury.

Next, defendant asserts the demonstration was unfairly prejudicial to defendant because it had the potential to drive the jury to an emotional rather than an evidentiary decision.

This Court has previously held that a video demonstration of a doll being subjected to shaken baby syndrome was not unfairly prejudicial. *State v. Carillo*, 149 N.C. App. 543, 552-53, 562 S.E.2d 47, 52-53 (2002). The video demonstration in *Carillo* was more graphic than the demonstration in the instant case because it contained an animated diagram of the infant brain. *Id.* Dr. Nakagawa’s toy doll demonstration was not unfairly prejudicial.

The State laid a proper foundation to establish the relevancy of Dr. Nakagawa’s shaken baby syndrome demonstration. This demonstration was neither misleading to the jury nor unfairly prejudicial to defendant. This argument is without merit.

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III. Closing Arguments

[2] In his second argument, defendant contends the trial court erred by overruling his objections to the prosecutors' closing arguments. We disagree.

The United States Constitution and the North Carolina Constitution grant a criminal defendant the right not to testify. U.S. Const. amend. V; N.C. Const. art. I § 23; *see State v. Mitchell*, 353 N.C. 309, 326, 543 S.E.2d 830, 840 (2001), *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (2001). The State "violates this rule if the language used was manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *State v. Parker*, 185 N.C. App. 437, 444, 651 S.E.2d 377, 382 (internal quotations and citations omitted), *appeal dismissed and disc. review denied*, 362 N.C. 91, 657 S.E.2d 26 (2007). "However, in its closing argument, the State may properly bring to the jury's attention the failure of a defendant to produce exculpatory evidence or to contradict evidence presented by the State." *State v. Parker*, 350 N.C. 411, 431, 516 S.E.2d 106, 120 (1999) (citing *State v. Mason*, 317 N.C. 283, 287, 345 S.E.2d 195, 197 (1986)), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000). Defendant preserved this issue by timely objection to both arguments at trial. We first review whether the prosecutors violated defendant's constitutional right not to testify. *State v. Walker*, 316 N.C. 33, 38, 340 S.E.2d 80, 82 (1986). If a violation occurred, then the burden is upon the State to demonstrate this violation was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2007); *Mitchell*, 353 N.C. at 326, 543 S.E.2d at 841.

Defendant argues the prosecutor's statements regarding defendant's failure to present mental health evidence or a mental health defense violated his constitutional right not to testify.

Closing arguments must be viewed in context and in light of the overall factual circumstances to which they referred. *State v. Flowers*, 347 N.C. 1, 36, 489 S.E.2d 391, 412 (1997) (citation omitted), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). In the jury *voir dire*, defense counsel repeatedly questioned potential jurors if mental health evidence or a mental health defense would offend them. Defense counsel posed the question, "You will hear some evidence about the Defendant's mental capabilities, or lack thereof, would that prevent you from being fair and impartial and listening to all of the evidence?" In her opening statement, defense counsel referred to

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defendant as “not only just young physically, but young socially, and emotionally, and to some extent limited educationally and mentally. A young man with a borderline IQ of 70.”

At trial, no evidence was presented regarding defendant’s mental health or limited cognitive abilities, and defendant did not present any evidence. In closing argument, the prosecutor stated, “[T]here is nothing to preclude the defense from putting on evidence, evidence like you heard in jury selection, you were going to hear that he was mentally retarded. See that’s about broken promises. Broken promises from the defense.”

We do not condone in any respect the State’s use of the term “broken promises” in its closing argument.

Under the provisions of Rule 9 of the General Rules of Practice for the Superior and District Courts and N.C. Gen. Stat. § 15A-1221(a)(4), defendant can make an opening statement to the jury. “An opening statement is for the purpose of making a general forecast of the evidence” *State v. Mash*, 328 N.C. 61, 65, 399 S.E.2d 307, 310 (1991) (citation omitted). When defendant forecasts evidence in the opening statement, the State is permitted to comment upon the lack of evidence supporting such a forecast in closing argument. “Since the evidence did not support the facts contained in defendant’s opening statement, it was not improper for the district attorney to highlight the absence of evidence.” *State v. Harris*, 338 N.C. 211, 229, 449 S.E.2d 462, 471 (1994). The State’s argument highlighted the total lack of evidence at trial supporting the forecast of evidence by defense counsel in the opening statement and was not a comment on the failure of the accused to testify. We further note that testimony concerning the defendant’s mental retardation would necessarily require expert testimony, not the testimony of defendant. We find no constitutional violation and do not examine whether the statements were harmless beyond a reasonable doubt.

Defendant also argues the prosecutor’s arguments regarding the failure to present an accident defense violated defendant’s right not to testify because defendant was the only person who could testify that J.S.’s injuries were accidental. The State presented two expert witnesses at trial who testified that in their opinion J.S.’s injuries were not accidental. During closing arguments, the prosecutor argued to the jury;

[T]here has been a lack of evidence about this Defendant’s mental health. And the reason that I bring this point up, Members of

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the Jury, is that Judge Eagles is going to give us the law at the end of this case. She is not going to give you any type of mental health defense instruction. You cannot create a defense for the Defendant. You will not hear Judge Eagles say this Defendant was suffering from anything, you cannot—you will not hear Judge Eagles say that—anything about this Defendant mitigates this offense. You will not hear any defense about accident.

Accident is not an affirmative defense shifting the burden of proof to a defendant charged with murder. *State v. Jones*, 287 N.C. 84, 100, 214 S.E.2d 24, 35 (1975). Rather, the burden is on the State to prove the essential elements of murder including intent, thus disproving a defendant's assertion of accident. *Id.*

Our Supreme Court has repeatedly stated that “prosecutors ‘may comment on a defendant’s failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State.’ ” *State v. Barden*, 356 N.C. 316, 355, 572 S.E.2d 108, 133 (2002) (quoting *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993)), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). In *State v. Skeels*, the Supreme Court held, “[t]he prosecutor merely commented on the defendant’s failure to present any evidence in his defense. As such, the prosecutor’s comments were proper” *State v. Skeels*, 346 N.C. 147, 153, 484 S.E.2d 390, 393 (1997). The prosecutor’s comments in this case were not directed toward defendant’s failure to testify, but rather were directed to the lack of any mention of mental health or accident in the trial court’s jury instructions. The prosecutor’s argument was a request to the jury to follow the trial court’s instructions, and not to create legal issues during their deliberations that were not part of the trial court’s instructions. Defendant did not assign as error the trial court’s failure to instruct the jury on accident. Defendant did assign as error the trial court’s failure to instruct the jury on mental capacity; however, defendant does not argue these assignments of error in his brief, and they are thus deemed abandoned pursuant to Rule 28(b)(6) of the Rules of Appellate Procedure. N.C.R. App. P. 28(b)(6).

Defendant’s argument is based largely upon the case of *State v. Baymon*, 336 N.C. 748, 446 S.E.2d 1 (1994). In that case, the prosecutor directly commented upon defendant’s failure to testify: “We don’t know how many times the child was . . . sexually [assaulted or abused]. . . . The defendant knows, but he’s not going to tell you.” *Id.* at 757, 446 S.E.2d at 6. In the instant case, there were no arguments

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made by the prosecutors to the jury directly commenting on defendant's failure to testify. *Baymon* is not controlling in this case.

Even assuming *arguendo* that the prosecutor's statements somehow rose to the level of a constitutional violation, they were harmless beyond a reasonable doubt.

Prosecutors argued to the jury that the burden of proof was upon the State to show defendant's guilt. In addition, the trial court charged the jury upon the presumption of innocence and that the State had the burden of proving defendant's guilt beyond a reasonable doubt, both generally and specifically as to each charge. The trial court also charged the jury that defendant's failure to testify created no presumption against him. The jury is presumed to have followed the instructions of the trial court. *State v. Thornton*, 158 N.C. App. 645, 652, 582 S.E.2d 308, 312 (2003) (citations omitted).

The argument of the prosecutor did not implicate or violate defendant's constitutional right not to testify on his own behalf. This argument is without merit.

IV. Separate Sentencing Proceeding

[3] In his third argument, defendant contends the trial court abused its discretion by not holding a separate sentencing proceeding for aggravating factors. We disagree.

North Carolina's Structured Sentencing Act states, "The jury impaneled for the trial of the felony may, in the same trial, also determine if one or more aggravating factors is present, unless the court determines that the interests of justice require that a separate sentencing proceeding be used to make that determination." N.C. Gen. Stat. § 15A-1340.16(a1) (2007)¹. The decision to hold a separate proceeding is vested in the discretion of the trial court. Our standard of review for such a decision is abuse of discretion. *State v. Tucker*, 347 N.C. 235, 240, 490 S.E.2d 559, 561 (1997) (citations omitted), *cert. denied*, 523 U.S. 1061, 140 L. Ed. 2d 649 (1998). The trial court may only be reversed for an abuse of discretion upon a showing that its decision was so arbitrary that it could not have been the result of a reasoned decision. *State v. Morgan*, 183 N.C. App. 160, 168, 645 S.E.2d 93, 100 (2007) (citing *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985)), *appeal dismissed and disc. review denied*, 362 N.C. 241, 660 S.E.2d 536 (2008).

1. Section (d)(6a) of this statute was amended by the 2009 Session Laws; however, this amendment has no effect on the instant case. 2009 N.C. Sess. Laws 460.

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After the State rested, defendant did not offer any evidence. The trial judge specifically asked defense counsel whether she had any additional evidence to offer pertaining to the aggravating factors, and counsel responded, "I wouldn't put on any evidence." There was thus no additional evidence to be offered at a separate sentencing proceeding for the aggravating factors. The trial court submitted the issues of guilty or not guilty, and the aggravating factors to the jury on the same verdict sheet.

Defendant argues this unfairly prejudiced him by inappropriately emphasizing the aggravating factors, which were not elements of the offenses. As to each charge, the trial judge instructed the jury that they were not to consider the aggravating factors unless they first found defendant guilty beyond a reasonable doubt of the substantive offense. In addition to the trial judge's verbal instructions, the individual verdict sheets for each charge contained written instructions stating that if the jury found defendant guilty of the particular offense, then the jury would consider the aggravating factors. Defendant fails to show how the trial court abused its discretion in not conducting a separate sentencing proceeding.

Defendant next argues that the procedures requiring bifurcated proceedings in capital sentencing and habitual felon cases provide proper guidance for the submission of aggravating factors pursuant to N.C. Gen. Stat. § 15A-1340.16(a1). In both capital sentencing and habitual felon cases, the applicable statutes explicitly require the trial court to bifurcate the proceedings. N.C. Gen. Stat. §§ 15A-2000(a)(1), 14-7.6 (2007). The plain language of N.C. Gen. Stat. § 15A-1340.16(a1) vests the trial court with the discretion to bifurcate the felony offense proceeding from an aggravating factor determination in the interests of justice. N.C. Gen. Stat. § 15A-1340.16(a1) (2007).

Defendant fails to show how the trial court's decision not to require a separate proceeding amounted to an abuse of discretion. This argument is without merit.

NO ERROR.

Judges McGEE and JACKSON concur.

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[200 N.C. App. 228 (2009)]

PHILLIP McMILLAN, JANET CONNELL, TRACY TURNER, CARROLL C. TURNER, DALE DRAKE, REGINALD DRAKE, BOBBIE WILSON, J. BRUCE WILSON, MARGARET WILSON, GEORGIA C. MARX, MELVIN MARX, JOHN EARL FOY, RUTH P. FOY, STEVE K. PERRY, KIPP COX, NANCY MADAR, PAUL MADAR, JOAN R. POST, KARL A. WILLIAMS, BARBARA A. WILLIAMS, GUNTAM M. GERSCH, STANLEY BRIGHTWELL, ALAN LURIA, PAT RYAN, EARL A. BETTINGER, J. RANDALL GROBE, PLAINTIFFS v. TOWN OF TRYON, AN INCORPORATED MUNICIPALITY OF THE STATE OF NORTH CAROLINA, TOWN COUNCIL FOR THE TOWN OF TRYON, AND THE TRYON COUNTRY CLUB, INC., RESPONDENTS AND DEFENDANTS, DEFENDANTS

No. COA08-1253

(Filed 6 October 2009)

1. Pleadings— motion to further amend denied—undue prejudice to opposing party

The trial court did not abuse its discretion by denying plaintiffs' motion to further amend their pleadings to include additional allegations of a commissioner's conflict of interest and *ex parte* communications prior to a rezoning hearing. Plaintiffs' delay in seeking the amendment would have unduly prejudiced defendants and the proposed amendment would have been futile.

2. Zoning— rezoning—summary judgment—scope of review

The trial court erred in a rezoning case by granting defendants' motion for summary judgment; the matter is remanded to the trial court for imposition of the standard of review set forth in *Friends of Mt. Vernon Springs, Inc.*, 190 N.C. App. 633 (2008).

Appeal by plaintiffs from an order entered 29 May 2008 by Judge J. Marlene Hyatt in Polk County Superior Court. Heard in the Court of Appeals 26 March 2009.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus; and Whitmire & Beeker, by Angela Beeker, Esq., for plaintiffs-appellants.

Parker Poe Adams & Bernstein L.L.P., by Anthony Fox, Benjamin R. Sullivan, and Susan W. Matthews, for defendants-appellees.

JACKSON, Judge.

Phillip McMillan ("McMillan"), Janet Connell, Tracy Turner, Carol C. Turner, Dale Drake, Reginald Drake ("Drake"), Bobbie Wilson,

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J. Bruce Wilson (“Wilson”), Georgia C. Marx, Melvin Marx, John Earl Foy, Ruth P. Foy, Steve K. Perry, Kipp Cox, Nancy Madar, Paul Madar, Joan R. Post, Karl A. Williams, Barbara A. Williams, Guntham M. Gersch, Stanley Brightwell, Alan Luria, Pat Ryan, Earl A. Bettinger, and J. Randall Grobe (collectively, “plaintiffs”) appeal from an order entered 29 May 2008 granting summary judgment in favor of the Town of Tryon (“Town”), Town Council for the Town of Tryon (“Town Council”), and the Tryon Country Club, Inc. (“Country Club”) (collectively, “defendants”). For the reasons set forth below, we affirm in part, reverse in part, and remand.

As set forth in a related appeal in Court of Appeals file number 08-642 filed contemporaneously herewith, the instant appeal concerns the re-zoning of approximately 126 acres of Country Club property—all of which is located within the Town’s municipal boundaries or subject to the Town’s zoning authority—to allow the development of sixty new residential homes.

In October 2006, a proposal to re-zone the property had been denied, and, after waiting the required three months, the proposal was resubmitted with additional information. On 20 March 2007, the Town Council conducted a hearing to reconsider re-zoning approximately 126 acres of the Country Club property from “P-1” open-space zone and “R-3” single-family home residential zone to an “R-4 Conditional Use Zone” so that it would be possible to build a mixture of single-family units as well as duplexes in a portion of the re-zoned area upon the issuance of a Conditional Use Permit.

The Country Club and developers from dewSouth Communities (“dewSouth”) planned to develop approximately sixty new residential units as well as a new tennis and swimming facility for the Country Club on approximately fifty-one of the 126 re-zoned acres. The sixty new residential units were to be comprised of forty single-family residences and ten duplexes. Without re-zoning the R-3 district to an R-4 Conditional Use Zone and issuing a Conditional Use Permit, the duplexes would be an unlawful use of the land.

At the 20 March 2007 hearing, the Town Council heard sworn testimony from Town residents; Country Club residents; plaintiffs McMillan, Drake, and Wilson; and architects and other members of the dewSouth development team. The Town Council unanimously voted in favor of re-zoning a portion of the Country Club property to an R-4 Conditional Use Zone. The Town Council also unanimously

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voted to approve the associated Conditional Use Permit necessary to allow the proposed development of the re-zoned property.

On 20 April 2007, plaintiffs filed a complaint and petition for writ of *certiorari*¹ seeking review of the 20 March 2007 hearing. On 10 July 2007, defendants filed an answer. On 11 July 2007, the parties submitted to the superior court the record of the Town Council's proceedings at the 20 March 2007 hearing. On 14 January 2008, plaintiffs filed amendments to their original petition and complaint to which defendants jointly responded on 19 February 2008. On 14 March 2008, defendants filed a motion for summary judgment. On 20 March 2008, plaintiffs moved the trial court (1) for leave to further amend their amended petition and complaint, and (2) for a continuance. On 29 May 2008, the trial court entered an order denying plaintiffs' motion to further amend their amended petition and complaint and granting summary judgment in defendants' favor. Plaintiffs appeal.

[1] On appeal, plaintiffs first argue that the trial court erred in denying their motion to further amend their pleadings to include additional allegations relating to Commissioner Benson's purported conflict of interest and *ex parte* communications prior to the 20 March 2007 re-zoning hearing. We disagree.

North Carolina Rules of Civil Procedure, Rule 15 provides in relevant part that

[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

N.C. Gen. Stat. § 1A-1, Rule 15(a) (2007). Proper reasons for denying a motion to amend include, *inter alia*, undue delay by the moving party, unfair prejudice to the non-moving party, and futility of the amendment. *Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 166, 510 S.E.2d 690, 694, *disc. rev. denied*, 350 N.C. 379, 536 S.E.2d 70 (1999) (citations omitted). It is

1. Issues related to plaintiffs' petition for writ of *certiorari* are not considered in this appeal, but are addressed in a related appeal filed contemporaneously herewith with our file number 08-642.

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well-established that a motion pursuant to Rule 15(a) “for leave of court to amend a pleading is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion.” *Kinnard v. Mecklenburg Fair, Ltd.*, 46 N.C. App. 725, 727, 266 S.E.2d 14, 16 (citing *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119, *cert. denied and appeal dismissed*, 294 N.C. 736, 244 S.E.2d 154 (1978)), *aff’d*, 301 N.C. 522, 524, 271 S.E.2d 909, 910 (1980) (per curiam).

In the case *sub judice*, plaintiffs filed their original complaint on 20 April 2007. On 14 January 2008, plaintiffs amended their complaint with leave of the court. In plaintiffs’ original and amended complaints, plaintiffs alleged in relevant part that

[t]he procedures followed by the Town Council at the March 20, 2007 [hearing] violated the procedural due process rights of the [plaintiffs] in that Commissioner Benson participated in the hearing, after disclosing that he was a member of the Country Club. Such membership by Commissioner Benson constituted an impermissible conflict of interest, and precluded consideration of the matter by an impartial decision-maker.

On 14 March 2008, defendants filed a motion for summary judgment with supporting affidavits, including an affidavit from Ted Hiley (“Hiley”), a member of the Country Club’s Board of Directors. In his affidavit, Hiley stated that after the October 2006 denial of the re-zoning proposal, the Town Council urged the Country Club to invite concerned property owners to a meeting where they could learn more about the proposed development.

On 20 March 2008—one year after the events giving rise to plaintiffs’ cause of action and eleven months after plaintiffs’ original complaint—plaintiffs moved the trial court (1) for leave to amend their amended petition and complaint again in light of Hiley’s affidavit, and (2) for a continuance to depose witnesses and secure affidavits in opposition to defendants’ motion for summary judgment. Plaintiffs argued that Hiley’s affidavit raised an inference of *ex parte* communications between the Town Council and the Country Club prior to the 20 March 2007 hearing, which may have created an improper bias.

On 14 April 2008, the matter came on for hearing. At the hearing, defendants’ counsel argued that

[c]oncerning the undue prejudice argument, Your honor it’s important for me to emphasize where we are in this case. Plaintiffs

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filed this lawsuit on April 20th last year. This Sunday will be the one-year anniversary. And until they took the depositions that they took last week[,] plaintiffs had conducted no discovery in this case, no interrogatories, no request for production, no depositions, nothing at all.

That's not until after we filed a motion for summary judgment on March 14 that they filed this motion to amend and noticed the depositions they took last week. Their motion to amend says that their motion is based on the [f]act that our motion for summary judgment revealed new information.

If that's true, I would submit that the information was new to them because plaintiffs did nothing for the first year of this case to obtain any information.

. . . .

If you don't do any discovery[,] the odds of being surprised by the defendant's motion for summary judgment is a chance that you take Plaintiffs have had a year to do discovery, develop their case, and figure out what their theories and allegations should be.

Our motion for summary judgment is based on the complaint as it stands today and [it] would unduly prejudice us, Your honor to allow them to amend at this late stage.

On 29 May 2008, having reviewed the motion and counsels' arguments, the trial court denied plaintiffs' second motion to amend their pleadings "because it would unduly prejudice Defendants, because Plaintiffs unduly delayed in seeking the amendment, and because the proposed amendment would be futile." On appeal, plaintiffs acknowledge that the original and amended pleadings "already provided insight as to procedural irregularities that will necessarily require proof similar to that obtained in the depositions" It is axiomatic that plaintiffs bear the burden of proof on their claims, and because plaintiffs admittedly were aware that discovery would clarify the issues and refine the theories, defendants should not be burdened by plaintiffs' unreasonable delay in vetting their claim. Accordingly, in light of the foregoing, we agree with the trial court, and we hold that the trial court did not abuse its discretion in denying plaintiffs' motion to further amend their pleadings.

[2] Next, plaintiffs argue that the trial court erred in granting defendants' motion for summary judgment because the record demonstrates

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that the Town Council committed procedural violations in adopting the ordinance. We agree.

“We review a trial court’s order for summary judgment *de novo* to determine whether there is a ‘genuine issue of material fact’ and whether either party is ‘entitled to judgment as a matter of law.’” *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007) (quoting *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citing N.C. Gen. Stat. § 1A-1, Rule 56(c))).

We recently reiterated the well-established rule that “[l]ocal governments have only powers conferred to them by the Legislature.” *Thrash Ltd. P’ship v. County of Buncombe*, 195 N.C. App. 727, 732, 673 S.E.2d 689, 693 (2009) (citing *Keiger v. Board of Adjustment*, 281 N.C. 715, 720, 190 S.E.2d 175, 179 (1972) and *Surplus Co. v. Pleasants*, 264 N.C. 650, 654, 142 S.E.2d 697, 701 (1965)). North Carolina General Statutes, section 160A-381 grants a municipality the power to regulate the uses of land within its jurisdiction “[f]or the purpose of promoting health, safety, morals, or the general welfare of the community” N.C. Gen. Stat. § 160A-381(a) (2007).

Section 160A-381 further authorizes municipalities to enact regulations which allow the municipality to issue special use permits or conditional use permits “in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits.” N.C. Gen. Stat. § 160A-381(c) (2007). “When deciding special use permits or conditional use permits, the city council or planning board shall follow quasi-judicial procedures.” *Id.* However, we have instructed that “[t]he plain language of this statute does not require that local ordinances provide for the issuance of conditional use permits. The statute clearly states that a city *may* provide for the issuance of such permits, but it clearly does not mandate such a procedure.” *Massey v. City of Charlotte*, 145 N.C. App. 345, 354, 550 S.E.2d 838, 845, *cert. denied*, 354 N.C. 219, 554 S.E.2d 342 (2001).

North Carolina General Statutes, section 160A-382 allows municipalities to adopt conditional use districts. N.C. Gen. Stat. § 160A-382 (2007). In relevant part, section 160A-382 provides that

[f]or any or all these purposes, the city may divide its territorial jurisdiction into districts of any number, shape, and area that may be deemed best suited to carry out the purposes of this Part; and within those districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of build-

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ings, structures, or land. Such districts may include, but shall not be limited to, general use districts, in which a variety of uses are permissible in accordance with general standards; overlay districts, in which additional requirements are imposed on certain properties within one or more underlying general or special use districts; and special use districts or conditional use districts, in which uses are permitted only upon the issuance of a special use permit or a conditional use permit and conditional zoning districts, in which site plans and individualized development conditions are imposed.

N.C. Gen. Stat. § 160A-382 (2007).

In *Summers v. City of Charlotte*, 149 N.C. App. 509, 562 S.E.2d 18, *disc. rev. denied and appeal dismissed*, 355 N.C. 758, 566 S.E.2d 482 (2002), we explained that

[z]oning is generally described as a legislative process. Conditional use zoning, as historically practiced, is a two-step process with the rezoning decision meeting all of the statutory requirements for legislative decisions and the permit decision meeting all of the constitutional requirements for quasi-judicial decisions. More recently, however, some local governments have combined this two-step process into one proceeding, commonly referred to as conditional zoning. Under this procedure, the rezoning decision is made concurrent with approval of the site plan. This combined procedure or conditional zoning is entirely a legislative act.

Summers, 149 N.C. App. at 516-17, 562 S.E.2d at 24 (internal citations and quotation marks omitted). We also have explained that section 160A-382 does not “impos[e] any requirement of a quasi-judicial permitting process as a prerequisite to the exercise of the [legislative] discretion granted under the statute.” *Massey*, 145 N.C. App. at 355, 550 S.E.2d at 845.

In both *Massey* and *Summers*, we upheld the City of Charlotte’s conditional use re-zoning as a legislative act, but we noted that the relevant ordinances did not require any quasi-judicial process. *See Summers*, 149 N.C. App. at 516-17, 562 S.E.2d at 24 (affirming the city’s conditional use re-zoning in a single, legislative procedure)²;

2. In *Summers*, we explained that the North Carolina General Assembly previously had enacted Session Law 2000-84 which expressly allowed the City of Charlotte “to engage in conditional zoning as a legislative process.” *Summers*, 149 N.C. App. at 512, 562 S.E.2d at 21; 2000 N.C. Sess. Laws 84, § 1(e).

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Massey, 145 N.C. App. at 352-53, 550 S.E.2d at 844 (noting that the city followed the procedural requirements set forth in its ordinance and rejecting the trial court's conclusion that the absence of a quasi-judicial element invalidated the re-zoning decision)³. *See also Chrismon v. Guilford County*, 322 N.C. 611, 638-39, 370 S.E.2d 579, 594-95 (1988) (holding "that the Board [validly exercised its legislative discretion] in this matter only after a lengthy deliberation completely consistent with both the procedure called for by the relevant zoning ordinance and the rules prohibiting illegal contract zoning").

Furthermore, in *Knight v. Town of Knightdale*, 164 N.C. App. 766, 596 S.E.2d 881 (2004), we explained that

[t]he rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances. The basic rule of statutory construction is to ascertain and effectuate the intention of the municipal legislative body. The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.

Knight, 164 N.C. App. at 769, 596 S.E.2d at 884 (internal citations and quotation marks omitted).

In the case *sub judice*, however, the Town's Zoning Ordinance specifically required that

[p]roposals for rezoning to any Conditional Use District shall always be accompanied by a request for a Conditional Use Permit. *Such proposals and requests shall be processed and considered in a quasi-judicial manner.*

Any proposal for Conditional Use District rezoning and its accompanying request for a Conditional Use Permit shall be heard and considered simultaneously. If the Board of Commissioners should determine that the property involved in the proposal should be rezoned and the Conditional Use Permit issued, it shall adopt an Ordinance rezoning the property and authorizing the issuance of the Conditional Use Permit. Otherwise the proposal shall be denied.

Town of Tryon, N.C. Zoning Ordinance art. 9, § 9.7 (2005) (emphasis added).

3. In *Massey*, we noted that Session Law 2000-84 had been enacted by the time our decision was rendered, but that it had not been enacted when the proceeding had been filed. *Massey*, 145 N.C. App. at 347, 550 S.E.2d at 841. Accordingly, we limited our decision to the facts of the case and laws existing at the time the case had been filed. *Id.*

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In contrast to *Chrismon*, *Massey*, and *Summers*, which relied upon legislative conditional use zoning, here we review the Town's exercise of its statutorily granted prerogative pursuant to North Carolina General Statutes, section 160A-381 to adopt a quasi-judicial process when conducting a consolidated hearing re-zoning proposals and conditional use permit requests. Nonetheless, our case law is clear that "[z]oning and rezoning are legislative acts." *Brown v. Town of Davidson*, 113 N.C. App. 553, 556, 439 S.E.2d 206, 208 (1994) (citing *Sherrill v. Town of Wrightsville Beach*, 81 N.C. App. 369, 373, 344 S.E.2d 357, 360, *disc. rev. denied and appeal dismissed*, 318 N.C. 417, 349 S.E.2d 600 (1986)). See also *Childress v. Yadkin County*, 186 N.C. App. 30, 34, 650 S.E.2d 55, 59 (2007) ("Re-zoning is considered a legislative act.") (citation omitted); *Summers*, 149 N.C. App. at 516-17, 562 S.E.2d at 24 (describing zoning as a legislative process).

At the outset of the 20 March 2007 hearing, it was explained that conditional use zoning consists of two components—a legislative, re-zoning component and a quasi-judicial permitting component. Those who wished to speak at the hearing were sworn in at the beginning of the hearing "in [the] interest of time and getting more information at one time." However, in *Massey*, we explained that a quasi-judicial hearing "involves all due process requirements[.]" *Massey*, 145 N.C. App. at 349-50, 550 S.E.2d 842 (citations omitted). Therefore, we construe section 9.7 of the Town's Zoning Ordinance as a decision by the Town to employ a quasi-judicial process during hearings for conditional use zoning proposals and requests for conditional use permits as a means of (1) streamlining the introduction of evidence rather than receiving duplicative evidence in independent legislative and quasi-judicial hearings, and (2) offering the Town's residents enhanced due process protections even though the re-zoning decision ultimately remains legislative.

Although *Chrismon*, *Massey*, and *Summers* make clear that a completely legislative process may be employed when a county or municipality seeks to use conditional use zoning, if a political subdivision chooses to adopt a consolidated quasi-judicial process in conditional use zoning, we recognize that process as another valid means to exercise the valuable flexibility conditional use zoning offers when regulating land use. *Chrismon*, 322 N.C. at 622, 370 S.E.2d at 586.

Notwithstanding the Town's legislative decision to re-zone, by adoption of its ordinance, the Town bound itself to a quasi-judicial process when considering a re-zoning to Conditional Use District

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accompanied by a request for a Conditional Use Permit. Therefore, it was incumbent upon the superior court to

(1) review the record for errors of law, (2) ensure that procedures specified by law in both statute and ordinance are followed, (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.

Friends of Mt. Vernon Springs, Inc. v. Town of Siler City, 190 N.C. App. 633, 636, 660 S.E.2d 657, 660 (2008) (quoting *Humane Soc’y of Moore Cty., Inc. v. Town of Southern Pines*, 161 N.C. App. 625, 628-29, 589 S.E.2d 162, 165 (2003)). On appeal, our task is to (1) “determine whether the [superior] court exercised the proper scope of review, and (2) to review whether the [superior] court correctly applied this scope of review.” *Id.* (quoting *Humane Soc’y of Moore Cty., Inc. v. Town of Southern Pines*, 161 N.C. App. 625, 628-29, 589 S.E.2d 162, 165 (2003)).

Upon review, the trial court’s order reveals that the court did not exercise the proper scope of review set forth in *Friends of Mt. Vernon Springs, Inc.* See *id.* In relevant part, the trial court’s order granting defendants’ motion for summary judgment stated:

On April 20, 2007, Plaintiffs filed this action in Polk County Superior Court seeking: (i) a declaratory judgment that the Town Council’s decision to rezone TCC’s property was invalid and (ii) a Writ of Certiorari for this Court to review and overturn the Town Council’s quasi-judicial decision to issue the conditional use permit to TCC. This Court issued the Writ of Certiorari but, by Order dated February 14, 2008, subsequently dismissed Plaintiffs’ quasi-judicial appeal of the conditional use permit.

Remaining before this Court is Plaintiffs’ declaratory judgment claim challenging the rezoning of TCC’s property, and Defendants filed a March 14, 2008 Motion for Summary Judgment on that claim. On March 20, 2008, Plaintiffs filed a Motion to Amend their Amended Complaint in order to allege, among other things, that the rezoning of TCC’s property was quasi-judicial in nature rather than legislative. After reviewing the Motion and considering the arguments of counsel, this Court rules that

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Plaintiffs' Motion to Amend should be DENIED because it would unduly prejudice Defendants, because plaintiffs unduly delayed in seeking the amendment, and because the proposed amendment would be futile.

And the Court, having now considered all relevant pleadings in this matter, the affidavits and deposition transcripts submitted, the briefs submitted by each party, and the arguments made by the parties' respective counsel, determines that no genuine issue of material fact exists as to Plaintiffs' remaining claim for declaratory judgment and that Defendants are entitled to judgment in their favor as a matter of law.

Accordingly, the order from which plaintiffs appealed is insufficient for us to perform our review as an appellate Court. *See id.* Therefore, we remand the matter to the trial court for imposition of the proper standard of review as set forth in *Friends of Mt. Vernon Springs, Inc.*

Because we so hold, we do not need to further address plaintiffs' remaining arguments.

For the foregoing reasons, the trial court's denial of plaintiffs' motion to amend their pleadings is affirmed, but the entry of summary judgment in defendants' favor is reversed, and the matter is remanded to the trial court.

Affirmed in part; Reversed in part; Remanded.

Judges STEPHENS and STROUD concur.

IN THE MATTER OF THE APPEAL OF SAS INSTITUTE INC. FROM A DECISION OF
THE WAKE COUNTY BOARD OF COMMISSIONERS FOR 2006

No. COA08-1106

(Filed 6 October 2009)

**Taxation— *ad valorem*—corporate airplane—modification in
Delaware**

SAS was required to pay *ad valorem* taxes on an airplane consistent with its value on 1 January 2003 where the plane was in Delaware on that date for installation of a custom interior and

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stayed there through early September of 2003. SAS presented no evidence that the plane was intended to remain in Delaware after the interior was completed and the plane is properly classified as having been located in Delaware only for temporary maintenance or alteration.

Judge CALABRIA dissenting.

Appeal by taxpayer from judgment entered by Chairman Terry L. Wheeler of the Property Tax Commission. Heard in the Court of Appeals 11 February 2009.

C.B. McLean Jr. for taxpayer SAS Institute Inc.

Shelley T. Eason for Wake County.

ELMORE, Judge.

This case concerns whether Wake County can levy an *ad valorem* tax for the year 2003 on a plane owned by the SAS Institute (SAS). The plane was in Delaware on 1 January 2003 and stayed in Delaware through early September 2003 while a custom-made interior was being designed and installed; the plane was then returned to Wake County, where it was used by SAS through the end of 2003. The Wake County Assessor (Assessor), the Wake County Tax Committee, and the Property Tax Commission (Commission) all held that SAS should have listed the plane on its 2003 tax forms and, therefore, SAS would be required to pay taxes on the plane for 2003. SAS then appealed to this Court. We affirm the Commission's decision.

FACTS

The facts of this case are undisputed. SAS is a North Carolina corporation with its principal offices in Wake County. On 25 November 2002, SAS purchased an unfinished Boeing 737 jet airplane in South Carolina. The plane was immediately flown to Louisiana for painting, and stayed in Louisiana from 25 November 2002 until 20 December 2002. On 21 December 2002, the plane was flown to Delaware for a custom-made interior to be constructed and installed by DeCrane Aircraft Systems Integration Group (DeCrane). The plane stayed in Delaware from 21 December 2002 through 23 August 2003; it was not flown during this period. The plane was given an Airworthiness Certificate by the Federal Aviation Administration on 3 September 2003, at which point it was flown back to Wake County and turned over to SAS.

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SAS listed the plane on its tax forms for 2004 and subsequent years, but it did not list the plane for its 2003 tax forms. In 2006, the Wake County Revenue Department discovered that the plane had not been listed on SAS's 2003 tax forms and notified SAS of this discovery on 8 September 2006. SAS appealed to the Assessor, who decided that the plane should have been listed by SAS for tax year 2003. On 8 January 2007, the Wake County Tax Committee affirmed the Assessor's decision. SAS then appealed to the Commission, which issued an order on 10 March 2008 affirming the Wake County Tax Committee's decision that the aircraft was subject to *ad valorem* taxation by Wake County for 2003. SAS then appealed to this Court. For the reasons stated below, we affirm the Commission's decision.

ARGUMENT

The outcome of this case depends on whether the plane's tax situs for 2003 was North Carolina or Delaware. SAS argues that the plane's 2003 tax situs was Delaware, and, therefore, North Carolina cannot levy a tax on it; Wake County argues that the plane's 2003 tax situs was North Carolina, and, as such, Wake County can indeed levy a tax on it. We overrule SAS's arguments and hold that the Commission properly found the plane's 2003 tax situs to be North Carolina.

When decisions of the Commission are appealed to this Court, "[q]uestions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test." *In re Appeal of the Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). Both parties argue, without citation, that the plane's tax situs is a question of law, although previous North Carolina cases have tended to treat tax situs as a question of fact. *See In re Appeal of Hanes Dye & Finishing Co.*, 285 N.C. 598, 611, 207 S.E.2d 729, 737 (1974) ("The ownership and uses for which the property is designed, and the circumstances of its being in the state, are so various that the question is often more a question of fact than of law.") (quoting 71 Am. Jur. 2d, State and Local Taxation, § 661 (1973)); *In re Bassett Furniture Industries, Inc.*, 79 N.C. App. 258, 263, 339 S.E.2d 16, 19 (1986). However, the precise standard of review in this case is a moot question, as we reach the same conclusion under both a *de novo* and a whole record approach.

General Statutes Chapter 105 sets out the laws governing taxation of property in North Carolina. *Spiers v. Davenport*, 263 N.C. 56,

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58, 138 S.E.2d 762, 763 (1964). N.C. Gen. Stat. § 105-274(a) provides that “[a]ll property, real and personal, within the jurisdiction of the State shall be subject to taxation unless it is [excluded or exempted by North Carolina statute or the North Carolina Constitution].” N.C. Gen. Stat. § 105-274(a) (2007). Ambiguities in statutes imposing taxes are construed in favor of the taxpayer, but statutes exempting property from taxation are construed against the taxpayer. *In re Appeal of Martin*, 286 N.C. 66, 77, 209 S.E.2d 766, 774 (1974). “Taxation is the rule; exemption the exception.” *Odd Fellows v. Swain*, 217 N.C. 632, 637, 9 S.E. 2d 365, 368 (1940). SAS argues that its plane qualifies for one of the exemptions listed in section 274. As such, SAS had the burden of establishing that its plane was not subject to *ad valorem* taxation by Wake County for 2003.

“The situs of personal property for purposes of taxation is determined by the legislature and the legislature may provide different rules for different kinds of property and may change the rules from time to time.” *Bassett*, 79 N.C. App. at 262, 339 S.E.2d at 18. The legislature has currently determined that, “[e]xcept as otherwise provided in this Chapter, the value, ownership, and *place of taxation* of personal property, both tangible and intangible, *shall be determined annually as of January 1.*” N.C. Gen. Stat. § 105-285(b) (2007) (emphases added). As for determining the place of taxation, N.C. Gen. Stat. § 105-304(c) provides that, “[e]xcept as otherwise provided in subsections (d) through (h) of this section, tangible personal property is taxable at the residence of the owner.” N.C. Gen. Stat. § 304(c) (2007). SAS claims that it qualifies for exception (f) of section 304, titled “Property Situated or Commonly Used at Premises Other Than Owner’s Residence,” which states:

(3) Tangible personal property situated at or commonly used in connection with a premise owned, hired, occupied, or used by a person who is in possession of the personal property *under a business agreement* with the property’s owner is taxable *at the place at which the possessor’s premise is situated*. For purposes of this subdivision, the term “business agreement” means a commercial lease, a bailment for hire, a consignment, or a similar business arrangement.

(4) In applying the provisions of subdivisions (1), (2), and (3) of this subsection, the temporary absence of tangible personal property from the place at which it is taxable under one of those subdivisions on the day as of which property is to be listed does not

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affect the application of the rules established in those subdivisions. *The presence of tangible personal property at a location specified in subdivision (1), (2), or (3) of this subsection on the day as of which property is to be listed is prima facie evidence that it is situated at or commonly used in connection with that location.*

N.C. Gen. Stat. §§ 105-304(f)(3), (4) (2007) (emphases added). SAS argues that, because the plane was in Delaware on 1 January 2003 under the provisions of a business arrangement with DeCrane, the plane's "place of taxation" should be considered DeCrane's location in Delaware and not SAS's principal place of business in Wake County. Assuming *arguendo* that SAS's business arrangement with DeCrane is "similar" to a "commercial lease, a bailment for hire, [or] a consignment," N.C. Gen. Stat. § 105-304(f)(3) (2007), the mere fact that the plane was not in Wake County on 1 January 2003 is not dispositive in determining that the plane's tax situs was Delaware; rather, it establishes only a *prima facie* case that the plane "is situated at or commonly used in connection with" the Delaware location. N.C. Gen. Stat. § 304(f)(4) (2007). As such, in order to qualify for the exemption, SAS was still required to establish by the greater weight of the evidence that the plane was "situated at" DeCrane's facilities in Delaware for tax year 2003; the term "situated" has been defined by N.C. Gen. Stat. § 304(b)(1) as "[m]ore or less permanently located." N.C. Gen. Stat. § 304(b)(1) (2007). Therefore, the question comes down to whether the plane was more or less permanently located in Delaware for tax year 2003.

SAS argues that the plane was in fact "more or less permanently located" in Delaware for tax year 2003 because the plane was at DeCrane's facilities continuously from late 2002 through early September 2003. As such, SAS argues that it meets the requirements of subsection (f) of section 304, establishing that the plane's tax situs for 2003 would be Delaware.

The general use and significance of the term "more or less permanently located" has been analyzed by our Supreme Court, quoting 71 Am. Jur. 2d, State and Local Taxation §§ 660 and 661, as follows:

§ 660 provides: "*Before tangible personal property may be taxed in a state other than the domicile of the owner, it must have acquired a more or less permanent location in that state, and not merely a transient or temporary one.* Generally, chattels merely temporarily or transiently within the limits of a state

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are not subject to its property taxes. Tangible personal property passing through or in the state for temporary purposes only, if it belongs to a nonresident, is not subject to taxation under a statute providing that all real and personal property in the state shall be assessed and taxed. . . . A criterion is whether the property is there for an indefinite time or some considerable definite time, and whether *it is used or exists there to be used in much the same manner as other property is used in that community. . . .*"

§ 661 provides: "Permanency in the sense of permanency of real estate is not essential to the establishment of a taxable situs for tangible personal property. It means a more or less permanent location for the time being. The ownership and uses for which the property is designed, and the circumstances of its being in the state, are so various that the question is often more a question of fact than of law. *In the final analysis, the test perhaps is whether or not property is within the state solely for use and profit there. . . .*"

. . .

The courts are all agreed that before tangible personal property may be taxed in a state other than its owner's domicile, it must acquire there a location more or less permanent. It is difficult to define the idea of permanency that this rule connotes. It is clear that "permanency," as used in this connection, does not convey the idea of the characteristics of the permanency of real estate. It merely involves the concept of being associated with the general mass of property in the state, as contrasted with a transient status.

In re Appeal of Hanes Dye, 285 N.C. at 611, 207 S.E.2d at 737 (emphases added).

Therefore, the default tax situs for SAS's plane was Wake County, which is SAS's principal place of business. In order to show that the plane had acquired a tax situs other than its principal place of business, SAS had to show that the plane was going to be used in Delaware "in much the same manner as other property is used in" Delaware, or that the plane was in Delaware "solely for use and profit there." However, those definitions cut against SAS because the plane was only in Delaware for the purposes of installing an interior and flight certification. Similarly, North Carolina excludes from taxation

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“[t]angible personal property shipped into this State for the purpose of repair, alteration, maintenance, or servicing and reshipment to the owner outside this State.” N.C. Gen. Stat. § 105-275(25) (2007). SAS presented no evidence that the plane was intended to remain in Delaware after the interior was completed. As such, the plane is properly classified as having been located in Delaware only for temporary maintenance or alteration—not for permanent use. Therefore, the default tax situs of the plane was SAS’s principal place of business, Wake County.

SAS cites *Bassett* as precedent that SAS’s plane should be considered more or less permanently located in Delaware for tax year 2003. In *Bassett*, a plane was hangared and used in North Carolina for close to a year while a longer runway was built in Virginia near Bassett’s headquarters. *Bassett*, 79 N.C. App. at 264, 339 S.E.2d at 20. This Court held that the plane was more or less permanently located in North Carolina, rather than Virginia; however, the plane was in North Carolina for regular use as an airplane, not for maintenance or alterations or repairs like the plane in the current case. *Id.* As such, the *Bassett* plane was used in this state in much the same manner as other planes are used in this state, and the plane was associated with the general mass of property in North Carolina, thereby meeting two factors that demonstrate that the plane was more or less permanently located in North Carolina, rather than Bassett’s Virginia headquarters. *Id.* Accordingly, the holding in *Bassett* actually supports our conclusion that SAS’s plane was “more or less permanently located” in North Carolina for tax year 2003 because SAS’s plane was in Delaware only for maintenance or alterations, rather than for continued, actual use as an airplane. SAS did not meet its burden of showing that it had qualified for an exemption under section 304(f), and SAS is required to pay *ad valorem* taxes on the plane consistent with its value on 1 January 2003. N.C. Gen. Stat. § 105-285(b) (2007).

Affirmed.

Judge STROUD concurs.

Judge CALABRIA dissents by separate opinion.

CALABRIA, Judge, dissenting.

The majority affirms the decision of the Property Tax Commission (“the Commission”) that the aircraft (“the aircraft”) owned by

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SAS Institute Inc. (“SAS”) had a tax situs in Wake County, North Carolina on 1 January 2003, and therefore was subject to ad valorem taxation in Wake County in 2003. I disagree because the facts indicate that the tax situs of the aircraft on 1 January 2003 was in Delaware, and not in North Carolina. Therefore, I respectfully dissent.

We review decisions of the Commission pursuant to N.C.G.S. § 105-345.2. Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission’s decision are reviewed under the whole-record test. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission. Under the whole-record test, however, the reviewing court merely determines whether an administrative decision has a rational basis in the evidence.

In re Appeal of the Greens of Pine Glen Ltd. P’ship, 356 N.C. 642, 646-47, 576 S.E.2d 316, 319 (2003) (internal quotations and citations omitted). At the hearing before the Commission, SAS had the burden of establishing, by the greater weight of the evidence, the existence of facts from which the Commission could conclude as a matter of law: (1) the aircraft was “more or less permanently located” in Delaware on 1 January 2003; (2) the tax situs of the aircraft on 1 January 2003 was in Delaware; and (3) the aircraft was therefore not subject to ad valorem taxation in Wake County for tax year 2003. See *Transfer Corp. v. County of Davidson*, 276 N.C. 19, 170 S.E.2d 873 (1969); *In re Appeal of Bassett Furniture Industries*, 79 N.C. App. 258, 262-63, 339 S.E.2d 16, 18-19 (1986).

The majority contends that SAS’s aircraft was not “situated” in Delaware on 1 January 2003 and therefore did not acquire a tax situs there. Under the majority’s interpretation, the aircraft is not entitled to the tax exemption of N.C. Gen. Stat. § 105-304(f)(3) (2007). I disagree.

Tangible personal property passing through or in the state for temporary purposes only, if it belongs to a nonresident, is not subject to taxation under a statute providing that all real and personal property in the state shall be assessed and taxed. . . . A criterion is whether the property is there *for an indefinite time or some considerable definite time*, and whether *it is used or exists there to be used in much the same manner as other property is used in that community*. . . .

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In re Appeal of Finishing Co., 285 N.C. 598, 611, 207 S.E.2d 729, 737 (1974)(quoting 71 Am. Jur. 2d, State and Local Taxation §§ 660 and 661 (1973))(emphases added). As conceded by the majority, SAS would qualify for a tax exemption under N.C. Gen. Stat. § 105-304(f)(3) if evidence provided by the whole record showed that the aircraft was more or less permanently located in Delaware on 1 January 2003. SAS was required to show that the aircraft was used “for an indefinite time or some considerable definite time” and “in much the same manner as other property is used” in Delaware. *Finishing Co.*, 285 N.C. at 598, 207 S.E.2d at 737. The majority determines that SAS did not meet this burden because they incorrectly characterize the work that was conducted on SAS’s aircraft in Delaware as “temporary maintenance or alteration.”

“Situs is an absolute essential for tax exaction.” *Transfer Corp.*, 276 N.C. at 32, 170 S.E.2d at 883 (internal citations omitted). “The state of domicile may tax the full value of a taxpayer’s tangible personal property for which no tax situs beyond the domicile has been established so that the property may not be said to have acquired an actual situs elsewhere.” *Id* (internal quotations and citations omitted). The majority correctly holds that, pursuant to N.C. Gen. Stat. § 105-304(c) (2007), the default tax situs for SAS’s aircraft would be its principal place of business, Wake County, North Carolina.

The test of whether a tax law violates due process is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. [N]o state may tax anything not within her jurisdiction without violating the Fourteenth Amendment.

Transfer Corp., 276 N.C. at 24-25, 170 S.E.2d at 878 (1969) (citations and quotations omitted).

On 1 January 2003, the relevant date for taxation purposes, the aircraft was not simply in transit through Delaware—it was undergoing extensive modifications by DeCrane Aircraft Systems Integration Group (“DeCrane”) that were expected to take, at the very least, approximately eleven months to complete. These were not simple repairs, but rather the installation of interior equipment required for the aircraft to be certified as airworthy for use as a passenger aircraft. Such substantial modifications necessarily would take several consecutive months to complete. The time period of approximately eleven months or more contemplated by the parties for the aircraft’s

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modification is properly categorized as a considerable amount of definite time, rather than a temporary period.

The majority places a great deal of emphasis on the fact that the aircraft was not in Delaware for regular use as an airplane. This ignores the fact that, at the time it was shipped to Delaware, the aircraft had *never* been in regular use as an airplane in North Carolina. As the parties stipulated, “the aircraft could not be used as a passenger aircraft because it had no passenger seats, interior walls, or interior furnishings. The aircraft was in Delaware for the purpose of adding these items to the aircraft so that it could be used as a passenger aircraft.” Therefore, the modifications were not merely aesthetic alterations; they were necessary and required modifications so that the aircraft could be used for its intended purpose as a passenger aircraft. This was the only way the aircraft could conceivably have been utilized as of 1 January 2003. Under the circumstances, the work performed by the DeCrane facility in Delaware, specifically, adding passenger seats, interior walls, and interior furnishings, would be considered using the aircraft in much the same manner as any other passenger aircraft in the same condition would be used in Delaware. SAS’s aircraft should have been considered “situated” in Delaware on 1 January 2003 and therefore exempt from taxation in North Carolina.

Furthermore, as of 1 January 2003, the aircraft, in its unmodified condition, had only been on the ground in North Carolina for one hour and twenty minutes on 25 November 2002 while owned by SAS. Since the aircraft was not in North Carolina on 1 January 2003, it could not be said that the aircraft benefitted from the protection of the laws of North Carolina. From 21 December 2002 until some time after 23 August 2003, the aircraft was in Delaware, entirely under the protection of the laws of the state of Delaware. The aircraft was protected from threats of theft, vandalism, and fire by the law enforcement and fire departments of Delaware, not of North Carolina. The modifications to the aircraft were undertaken entirely by employees of DeCrane, a Delaware company subject to Delaware taxation. Delaware certainly provided benefits to the aircraft during the time the aircraft was modified. By holding that the situs of the aircraft was in North Carolina on 1 January 2003, this Court allows North Carolina the benefit of taxing the aircraft when North Carolina had not “given anything for which it can ask return.” *Transfer Corp.*, 276 N.C. at 24-25, 170 S.E.2d at 878.

IN RE M.M.

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Finally, the majority's reliance on N.C. Gen. Stat. § 105-275(25) is misplaced. The majority correctly cites that statute for the proposition that North Carolina exempts from taxation tangible personal property shipped into North Carolina for "the purpose of repair, alteration, maintenance, or servicing and reshipment to the owner outside [North Carolina]." N.C. Gen. Stat. § 105-275(25) (2007). However, this statute has no bearing on this case. SAS's aircraft was not shipped into North Carolina for any of the purposes stated in the statute and it was not reshipped to an owner outside of North Carolina. The fact that North Carolina would exempt such personal property from taxation is immaterial to the determination of the situs of SAS's aircraft and therefore N.C. Gen. Stat. § 105-275(25) does not support the majority's holding.

Because SAS's aircraft was being used as any passenger aircraft in the same condition would be used in Delaware on 1 January 2003 and because the aircraft was at that time enjoying protection and benefits conferred by that state, its tax situs was in Delaware and, therefore, outside of North Carolina's tax jurisdiction. "The state of domicile may not levy an ad valorem tax on tangible personal property of its citizens which is *permanently* located in some other state *throughout the tax year*. This is forbidden by the Due Process Clause of the Fourteenth Amendment." *Transfer Corp.*, 276 N.C. at 30, 170 S.E.2d at 883. For North Carolina or Wake County to levy an ad valorem tax on the aircraft while at the same time conferring no benefit on that aircraft is a violation of SAS's due process rights. I would hold that SAS owed no ad valorem tax on the aircraft for the tax year 2003 and would reverse the decision of the Property Tax Commission.

IN THE MATTER OF: M.M.

No. COA09-610

(Filed 6 October 2009)

1. Termination of Parental Rights— unknown father—compliance with N.C.G.S. §§ 7B-1104 and 7B-1105

The trial court did not err by concluding that grounds existed under N.C.G.S. § 7B-1111(a)(5) to terminate respondent's parental rights to the minor child where respondent's identity as the father of the child was initially unknown. The Department of

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Social Services (DSS) complied with N.C.G.S. § 7B-1104 when filing the petition to terminate the parental rights of an unknown father and DSS and the trial court complied with N.C.G.S. § 7B-1105 and properly added respondent as a party to the termination proceeding.

2. Termination of Parental Rights— best interests of child—failure to exhibit parental interest in child

The trial court did not abuse its discretion by concluding that it was in the best interest of the minor child to terminate respondent biological father's parental rights because N.C.G.S. § 7B-1110 does not require that termination lead to adoption in order for termination to be in a child's best interest, and respondent has not taken any actions exhibiting a parental interest in the minor child other than consenting to the DNA test which ultimately established his paternity.

Appeal by respondent-appellant from order entered 17 March 2009 by Judge David V. Byrd in District Court, Yadkin County. Heard in the Court of Appeals 24 August 2009.

James N. Freeman, Jr., for petitioner-appellee Yadkin County Department of Social Services.

Wyrick Robbins Yates & Ponton LLP by Tobias S. Hampson, for respondent-appellant father.

Pamela Newell Williams, for the Guardian Ad Litem to the respondent-appellee minor child.

STROUD, Judge.

On 10 January 2008, the Yadkin County Department of Social Services ("DSS") filed a juvenile petition alleging that M.M. ("Michael")¹ was neglected and dependent. Michael's mother, D.T. ("the mother"), had just given birth to Michael, had five other children in foster care due to a previous adjudication of neglect and was working with DSS on her family services case plan involving those children. DSS assumed custody of Michael and placed him in a licensed foster care home. Michael has remained in this foster home since birth.

1. We will refer to the minor child M.M. by the pseudonym Michael to protect the child's identity and for ease of reading.

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The mother, although married to M.J.D., alleged her then current boyfriend, M.D.M., was the biological father of Michael. At the time of conception, M.J.D. was incarcerated and could not have been Michael's biological father. Later DNA testing of the mother's boyfriend confirmed M.D.M. was not the biological father. DSS later identified E.D.H. and M.P. as possible candidates as the biological father of Michael.

On 12 March 2008, the trial court entered an order finding Michael was a neglected and dependent juvenile. The trial court continued custody of Michael with DSS and ordered DSS to continue reasonable efforts toward reunification of Michael with his mother. However, by order entered 12 June 2008, the trial court relieved DSS of having to make reasonable efforts toward reunification with the mother and directed DSS to pursue the termination of parental rights to Michael.

On 31 July 2008, DSS filed a petition to terminate parental rights in Michael. DSS alleged that M.J.D. was the legal father of Michael and Michael's biological father was unknown. DSS further alleged that grounds existed to terminate the parental rights of the mother under N.C. Gen. Stat. § 7B-1111(a)(1) and (6), and that grounds existed to terminate the parental rights of the father under N.C. Gen. Stat. § 7B-1111(a)(5). DSS properly served Michael, the mother and the legal father. On 4 September 2008, petitioner caused a summons to be issued to the "unknown father" of the juvenile, but the record before this Court does not indicate whether petitioner served this summons by publication.

During a review hearing on 11 September 2008, the mother identified C.T. ("respondent-appellant") as a potential biological father of Michael. DSS located respondent-appellant in the Forsyth County Jail, and he acknowledged having had a relationship with the mother. Respondent-appellant agreed to a DNA test and his DNA sample was taken on 29 October 2008. Subsequent testing found respondent-appellant could not be excluded as the biological father of Michael and that the probability of paternity, when compared to an untested, unrelated male of the same population, was 99.99 percent.

After a review hearing on 20 November 2008, the trial court entered an order on 24 November 2008 finding that respondent-appellant is the biological father of Michael. The court named respondent-appellant as a party to the juvenile matter and ordered DSS to serve respondent-appellant with a juvenile summons and a

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copy of the termination petition. Due to the order requiring the addition of respondent-appellant as a party to the termination proceeding, the trial court continued the hearing on the termination petition until 29 January 2009.

On 4 December 2008, DSS caused the issuance of a summons naming respondent-appellant as a respondent in the termination proceedings, and respondent-appellant was served the following day. Respondent-appellant filed an answer and motion to dismiss the termination petition on 12 February 2009. Respondent-appellant moved to dismiss the petition based upon N.C. Gen. Stat. § 1A-1, Rule 12(b)(2)(2007), because “he is not alleged in the Petition to be the father of [Michael]” and based upon N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), because the petition failed to state a claim against respondent-appellant as he was “not alleged in the Petition to be the father of [Michael]”.

The trial court held a hearing on the termination petition on 12 February 2009, and granted DSS a continuance in order to permit DSS to amend the termination petition to include respondent-appellant as a named party. Since the continuance related to respondent-appellant only, the trial court held the hearing on the termination petition as to the mother and the legal father. On 13 February 2009, DSS filed an amended petition to terminate respondent-appellant’s parental rights in Michael, specifically naming respondent-appellant as the biological father of Michael.

On 5 March 2009, the trial court entered an order terminating the parental rights of the mother and the legal father. The trial court held a hearing on the amended petition to terminate respondent-appellant’s parental rights on 12 March 2009 and found grounds existed under N.C. Gen. Stat. § 7B-1111(a)(5) to terminate respondent-appellant’s parental rights. On 17 March 2009, the trial court entered an order terminating respondent-appellant’s parental rights in Michael. Respondent-appellant filed notice of appeal on 24 March 2009.

[1] Respondent-appellant argues the trial court erred in concluding grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) to terminate his parental rights in Michael. Respondent-appellant contends that the trial court’s order of 24 November 2008, finding he was the biological father of Michael, constitutes a judicial establishment of paternity which occurred prior to the filing of the termination peti-

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tion because DSS's filing of the amended petition on 13 February 2009 constitutes the filing of a new action. We disagree.

When DSS files a petition to terminate the parental rights of an unknown parent, the petition must "set forth with particularity the DSS's or movant's efforts to ascertain the identity or whereabouts of the parent or parents." N.C. Gen. Stat. § 7B-1104(3) (2007). The trial court must then conduct a preliminary hearing to ascertain the name or identity of the unknown parent. N.C. Gen. Stat. § 7B-1105(a) (2007). "Should the court ascertain the name or identity of the parent, it shall enter a finding to that effect; and the parent shall be summoned to appear in accordance with G.S. 7B-1106." N.C. Gen. Stat. § 7B-1105(b) (2007). Where the court is unable to ascertain the name or identity of the unknown parent,

the court shall order publication of notice of the termination proceeding and shall specifically order the place or places of publication and the contents of the notice which the court concludes is most likely to identify the juvenile to such unknown parent. The notice shall be published in a newspaper qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and published in the counties directed by the court, once a week for three successive weeks.

N.C. Gen. Stat. § 7B-1105(d) (2007). The notice must, *inter alia*, direct the unknown parent "to answer the petition within 30 days after a date stated in the notice[.]" N.C. Gen. Stat. § 7B-1105(d)(5) (2007). These General Statute provisions provide the means by which an unidentified parent may be made a participant in proceedings to terminate parental rights in a juvenile.

Here, DSS first filed a petition to terminate parental rights in Michael on 31 July 2008. In the petition, DSS alleged that the biological father of Michael was unknown and that M.J.D. was the legal father of Michael. DSS further alleged that M.J.D. was incarcerated at the time of Michael's conception and thus could not be the biological father. DSS also set forth with particularity its efforts to ascertain the identity of Michael's biological father:

The mother named her boyfriend, [M.D.M.], as a potential father of the minor juvenile, but DNA testing eliminated [M.D.M.] as the biological father. The mother named [E.D.H.], [M.P.] and a third person's first name as possibly being the biological father of the minor juvenile. She has since recanted that [E.D.H.] and [M.P.] are possible fathers of the juvenile.

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DSS then alleged that grounds existed to terminate the rights of the respondent father pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) (2007). DSS fully complied with the mandates of N.C. Gen. Stat. § 7B-1104 when filing the petition to terminate the parental rights of an unknown father.

DSS filed a motion with the trial court on 28 August 2008, seeking a hearing pursuant to N.C. Gen. Stat. § 7B-1105 to ascertain the name or identity of the unknown father. The trial court held a hearing on DSS's motion on 11 September 2008, at which the mother identified respondent-appellant as a potential biological father of Michael. On 15 September 2008, the trial court entered an order directing respondent-appellant to submit to a paternity test to determine if he is the biological father of Michael. Subsequent testing confirmed that respondent-appellant is the biological father of Michael, and on 24 November 2008 the trial court entered an order finding respondent-appellant is the biological father of Michael. The trial court's order also added respondent-appellant as a party to the termination proceeding and directed DSS to serve respondent-appellant with a summons and copy of the termination petition. DSS caused a summons in the matter to be issued to respondent-appellant on 4 December 2008, which was served on respondent-appellant on 5 December 2008. Thus, DSS and the trial court fully complied with the mandates of N.C. Gen. Stat. § 7B-1105, and respondent-appellant was properly added as a party to the termination proceeding.

On 13 February 2009, DSS filed an amended petition to terminate parental rights in Michael adding an allegation that respondent-appellant is the biological father of Michael. DSS also attached and incorporated into the amended petition the paternity test results and a copy of the 24 November 2008 order of the trial court designating respondent-appellant as a party to the termination proceeding. In the amended petition, DSS again alleged that grounds existed to terminate the parental rights of the father only pursuant to N.C. Gen. Stat. § 7B-1111(a)(5). Respondent-appellant's argument that this amended petition constituted a new action is misplaced.

Respondent-appellant is correct that in a general civil action, "an amended complaint has the effect of superseding the original complaint." *Hyder v. Dergance*, 76 N.C. App. 317, 319-20, 332 S.E.2d 713, 714 (1985). However, because respondent-appellant is Michael's biological father and because his identity was unknown at the time of the filing of the original petition, the addition of respondent-appellant as a party to the termination proceedings is controlled not by Rule 15 of

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the North Carolina Rules of Civil Procedure, but rather by N.C. Gen. Stat. § 7B-1105. *See In re Peirce*, 53 N.C. App. 373, 380, 281 S.E.2d 198, 202-03 (1981) (holding that the comprehensiveness of former Article 24B—the predecessor to Article 11—showed the legislature’s intent that Article 24B “exclusively control the procedure to be followed in the termination of parental rights” and that there was no intent for “the requirements of the basic rules of civil procedure of G.S. 1A-1 be superimposed upon” the statutory requirements governing proceedings to terminate parental rights); *see also In re B.L.H.*, 190 N.C. App. 142, 145-46, 660 S.E.2d 255, 257 (holding that the “North Carolina Rules of Civil Procedure do not provide parties in termination actions with procedural rights not explicitly granted by the juvenile code[,]” but will “apply to fill procedural gaps where Chapter 7B requires, but does not identify, a specific procedure to be used in termination cases.” (citations and quotations omitted)), *aff’d*, 362 N.C. 674, 669 S.E.2d 320 (2008). N.C. Gen. Stat. §§ 7B-1104 and 7B-1105 have specific provisions which address the procedure which the court is to follow in exactly the situation presented here: termination of parental rights of a biological father who has not yet been identified when the petition is originally filed. Defendant’s proposed use of N.C. Gen. Stat. § 1A-1, Rule 15 to deprive the court of personal jurisdiction over the newly identified father, despite compliance with N.C. Gen. Stat. § 7B-1105, through the creation of a “new action” when the biological father is eventually identified and made a party to the action would defeat the entire purpose of N.C. Gen. Stat. §§ 7B-1104 and 7B-1105. Respondent-appellant was properly added as a party to the termination proceeding pursuant to the trial court’s order of 24 November 2008 and the subsequent issuance and service upon him of the summons and petition to terminate parental rights in Michael.

Here, the amended petition is no more than a supplemental pleading which merely clarified that respondent-appellant was the biological father of Michael. In fact, the amended petition was not necessary for the trial court to have personal jurisdiction over respondent-appellant. DSS filed the amended petition only in response to respondent-appellant’s motion to dismiss, alleging that the trial court did not have personal jurisdiction over him and that the original petition stated no claim for relief against him because he was not alleged to be the father of Michael in the original petition. However, as noted above, DSS and the trial court both correctly followed the procedure set forth in N.C. Gen. Stat. § 7B-1105 for the identification of an unknown biological father and addition of the father to the action when he had been identified. N.C. Gen. Stat. § 7B-1105(b) provides

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that, “[s]hould the court ascertain the name or identity of the parent, it shall enter a finding to that effect; and the parent shall be summoned to appear in accordance with G.S. 7B-1106.” N.C. Gen. Stat. § 7B-1105(b) does not require that DSS file an amended petition upon identification of the unknown parent; it requires only that the trial court make a finding as to the identity of the parent and that the parent “be summoned to appear in accordance with G.S. 7B-1106.” Therefore, even without an amendment to the petition, the trial court would have had personal jurisdiction over respondent-appellant since it followed the procedure set forth by N.C. Gen. Stat. § 7B-1105. After having been found to be the biological father of Michael, respondent-appellant was put on notice that DSS sought the termination of his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) upon service of the summons and original petition. *See In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002) (“While there is no requirement that the factual allegations [in a petition for termination of parental rights] be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue.”). The amended petition did not change or otherwise add an additional ground for terminating the father’s parental rights and did not add a party to the proceeding as respondent-appellant was already a party to the termination proceeding. Accordingly, we hold the amended petition to terminate parental rights to Michael did not supersede the original petition such that a new action was brought upon its filing on 13 February 2009.

A trial court may terminate the parental rights of a father of a juvenile born out of wedlock if the father has not, prior to the filing of the petition to terminate his parental rights:

- a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services. . . ; or
- b. Legitimated the juvenile pursuant to provisions of G.S. 49-10 or filed a petition for this specific purpose; or
- c. Legitimated the juvenile by marriage to the mother of the juvenile; or
- d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

N.C. Gen. Stat. § 7B-1111(a)(5) (2007). When terminating the parental rights of a father under Section 7B-1111(a)(5), the trial court must

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find “that the putative father has not attempted *any* of the four possible ways to legitimate his child . . .” *In re Hunt*, 127 N.C. App. 370, 373, 489 S.E.2d 428, 430 (1997) (emphasis added); *see also In re I.S.*, 170 N.C. App. 78, 88, 611 S.E.2d 467, 473 (2005) (noting that, when basing the termination of parental rights on N.C. Gen. Stat. § 7B-1111(a)(5), “the court must make specific findings of fact as to all four subsections[.]”); *In re T.L.B.*, 167 N.C. App. 298, 302, 605 S.E.2d 249, 252 (2004) (“Upon a finding that the putative father has not attempted any of the four possible ways to legitimate his child, the trial court may terminate [his] parental rights.” (quotations and citation omitted)). “[T]he provisions of section 7B-1111(a)(5) are applied strictly, without regard to the respondent-father’s knowledge of the minor child[.]” *In re M.A.I.B.K.*, 184 N.C. App. 218, 223, 645 S.E.2d 881, 885 (2007). “On appeal, our standard of review for the termination of parental rights is whether the trial court’s findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law.” *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (quotations and citations omitted).

Here, the trial court found:

11. The respondent father and the mother . . . have never been married to one another.

12. The respondent father was unaware of the birth of the minor child until he was contacted by [DSS] regarding paternity testing. He did not know the name of the mother except by a nickname.

13. The respondent father has been continuously incarcerated since March of 2008. He has never seen the minor child. He has never provided substantial support or consistent care for the minor child or the mother in the way of child support or otherwise.

14. As evidenced by the letter admitted into evidence by the North Carolina Department of Health and Human Services, the father has not, prior to the filing of the petition to terminate parental rights, established paternity judicially or by affidavit.

15. The father has not legitimated the minor child pursuant to N.C.G.S. 49-10 or filed a petition for that purpose.

Respondent-appellant’s only challenge to these findings of fact is to finding of fact number fourteen, arguing that he established paternity

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judicially *prior to* the filing of the petition for termination of parental rights, referring to the amended petition, as discussed above. The remaining unchallenged findings of fact are binding on this Court on appeal. *In re J.D.S.*, 170 N.C. App. 244, 250-51, 612 S.E.2d 350, 354-55, *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005). Respondent-appellant contends he established paternity judicially via the trial court's order of 24 November 2008, and the paternity determination occurred prior to the filing of the amended petition on 13 February 2009. As discussed *supra*, respondent-appellant is required to have established paternity prior to the filing of the original petition on 31 July 2008. Thus, even if the trial court's order of 24 November 2008 constitutes a judicial determination of paternity, the order still came almost four full months after the filing of the petition. Again, respondent-appellant's proposed interpretation of the statutes is illogical. Indeed, if we were to accept his argument, it would be *impossible* for a biological father identified after the filing of the original petition, pursuant to N.C. Gen. Stat. § 7B-1105, to *ever* fail to "[establish] paternity judicially" pursuant to N.C. Gen. Stat. § 7B-1111(a)(5)(a) prior to the filing of the petition for termination of parental rights. Based upon respondent-appellant's argument, the father is unknown when the original petition is filed; the father is later identified; the trial court makes a finding in compliance with N.C. Gen. Stat. § 7B-1105(b) as to the identity of the father; an amendment to the petition is required to add the newly identified father, thus creating a "new action;" and thus, paternity was "judicially established" prior to the filing of the petition for termination of the father's rights, so that a father's parental rights in this situation could never be terminated pursuant to N.C. Gen. Stat. § 7B-1111(5). This interpretation does not accord with the plain language of N.C. Gen. Stat. § 7B-1105 and entirely defeats the purpose of N.C. Gen. Stat. §§ 7B-1105 and 7B-1111(5). Accordingly, the trial court's findings of fact support its conclusion of law that grounds existed to terminate respondent-appellant's parental rights in Michael pursuant to N.C. Gen. Stat. § 7B-1111(a)(5). *See In re A.R.H.B.*, 186 N.C. App. 211, 217, 651 S.E.2d 247, 253 (2007) (upholding the termination of the respondent-appellant father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(5) where paternity was established by DSS shortly before the termination hearing), *appeal dismissed*, 362 N.C. 235, 659 S.E.2d 433 (2008). These assignments of error are overruled.

[2] Respondent-appellant next argues the trial court abused its discretion in concluding it is in the best interest of Michael to terminate

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respondent-appellant's parental rights. Respondent-appellant contends the trial court abused its discretion because respondent-appellant's mother is willing to take custody of Michael and it is unclear whether Michael's foster parent will be able to adopt Michael. Again, we disagree.

"Once one or more of the grounds for termination are established, the trial court must proceed to the dispositional stage where the best interests of the child are considered." *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). "The decision to terminate parental rights is vested within the sound discretion of the trial judge and will not be overturned on appeal absent a showing that the [trial court's] actions were manifestly unsupported by reason." *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005) (citation omitted).

A trial court may, but is not required to, consider the availability of a relative placement during the dispositional phase of a hearing to terminate parental rights. *Id.* Further, nothing within N.C. Gen. Stat. § 7B-1110 (2007) requires that termination lead to adoption in order for termination to be in a child's best interests. Here, respondent-appellant has not taken any actions exhibiting a parental interest in Michael. Apart from not taking any of the actions in N.C. Gen. Stat. § 7B-1111(a)(5) which provide grounds for termination of his parental rights, respondent-appellant has never seen Michael and has never inquired after Michael's well-being, even after it was determined he was the biological father. While respondent-appellant's mother expressed her desire to have custody of Michael and made attempts to gain visitation and pay child support, respondent-appellant himself has done nothing except consent to the DNA test which ultimately established his paternity. Accordingly, we cannot hold that the trial court's conclusion that it is in the best interest of Michael to terminate respondent-appellant's parental rights is manifestly unsupported by reason. These assignments of error are overruled.

Affirmed.

Judges STEPHENS and ERVIN concur.

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DAVID M. ELLIOTT AND ELLIOTT AIR, INC., PLAINTIFFS v. LISA L. ELLIOTT, DIANE K. NICHOLS, KAREN POWERS, AND DENNIS L. MORAN, DEFENDANTS

No. COA08-1493

(Filed 6 October 2009)

1. Civil Procedure— Rule 60—excusable neglect—not notifying court of change of address—domestic abuse

The trial court properly concluded that defendant Lisa Elliot's failure to notify the court of a change of address was excusable neglect under Rule 60(b)(1), and the trial court did not abuse its discretion by vacating a judgement against defendant, in light of plaintiff David Elliot's documented history of domestic abuse and plaintiffs' violation of Rule 5 in not serving requests for admissions and subsequent pleadings on all defendants.

2. Conspiracy— civil—two allegations—prior partial summary judgment 12(b)(6) dismissal

The trial court correctly granted defendants' Rule 12(b)(6) motion to dismiss a civil conspiracy claim where the conspiracy allegations were raised in two paragraphs of the complaint and a prior partial summary judgment for defendants had disposed of the first allegation, which contained the only factual allegation of conspiracy.

Appeal by plaintiffs from orders entered 12 August 2008 and 28 August 2008 by Judges Abraham Penn Jones and Cressie H. Thigpen, Jr., respectively, in Alamance County Superior Court. Heard in the Court of Appeals 20 May 2009.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for plaintiff-appellants.

Adams & Winfree, by Charles H. Winfree, for defendant-appellees Lisa L. Elliott, Diane K. Nichols, and Karen Powers.

STEELMAN, Judge.

Although plaintiffs' appeal is from two interlocutory orders, we grant plaintiffs' petition for writ of *certiorari* and reach the merits of the appeal. Where the trial court's findings of fact tended to show that plaintiff David Elliott had a documented history of domestic abuse against defendant Lisa Elliott and that plaintiffs violated Rule 5 of the

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Rules of Civil Procedure by failing to serve the requests for admissions and subsequent pleadings on all defendants, the trial court properly concluded that Lisa Elliott's failure to notify the court of her change of address constituted excusable neglect under Rule 60(b)(1). Where plaintiffs failed to sufficiently allege a claim of civil conspiracy against defendants Diane Nichols and Karen Powers, the trial court properly dismissed that claim pursuant to Rule 12(b)(6).

I. Factual and Procedural Background

Plaintiff David Elliott (David) and defendant Lisa Elliott (Lisa) were formerly husband and wife and were divorced on 11 September 2006, following the parties' separation in 2005. During the marriage, Lisa at times acted as office manager, bookkeeper, and manager of accounts payable and receivable for plaintiff Elliott Air, Inc. (EAI). On 28 June 2005, David was arrested and charged with assault on a female and communicating threats against Lisa. On or around that date, Lisa's involvement with EAI ended. Lisa contends that she was never "employed" by EAI or David, but was a co-owner of EAI, owning 51% of the corporation.

David has a history of abusing and harassing Lisa. Between June 2005 and September 2007, David was convicted of assault on a female against Lisa, communicating threats against her, and violating a domestic violence protective order by communicating threats against Lisa's mother and co-defendant Karen Powers (Powers). As a result of these convictions, David was incarcerated for 75 days.

On 11 July 2007, plaintiffs filed a complaint alleging: (1) breach of fiduciary duty to EAI against Lisa; (2) conversion from EAI by Lisa; (3) conversion from David by Lisa; (4) fraud against David by Lisa; (5) fraud against EAI by all defendants; (6) conspiracy against EAI by all defendants; and (7) punitive damages. In addition to Lisa and Powers, the other named defendants in this case include Diane Nichols (Nichols), Lisa's sister, and Dennis Moran, who is not a party to this appeal.

On 29 August 2007, Lisa filed her answer, *pro se*, showing her address to be the former marital home in Browns Summit, North Carolina. On or around 15 September 2007, Lisa moved to Virginia and did not inform the court, plaintiffs, or plaintiffs' attorney of her new address. On 21 December 2007, plaintiffs served requests for admissions on Lisa at the address shown in her answer. Lisa did not receive plaintiffs' requests for admissions, nor was it served on

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any of the other defendants in this case. After she failed to make a timely response to the requests for admissions, the matters were deemed admitted, and summary judgment was entered against her in the amount of \$555,000.00 on 17 March 2008. On 5 August 2008, Lisa filed a motion to set aside the judgment and to be allowed to respond to the requests for admissions pursuant to Rule 60(b) of the Rules of Civil Procedure. On 28 August 2008, Judge Thigpen granted Lisa's motion.

On 20 September 2007, Nichols and Powers filed a separate answer to plaintiffs' complaint and a motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. Nichols and Powers later filed a motion for summary judgment as to all of plaintiffs' claims. On 24 July 2008, prior to ruling on Nichols and Powers' motion to dismiss, Judge Jones granted partial summary judgment in favor of Nichols and Powers, holding that two checks in the amount of \$10,000.00 and \$44,000.00 were the proceeds from a sale of Powers' real property and that plaintiffs had no claim at law or in equity on those funds or the real property that was located on 303 Rosemont Street, Gibsonville, North Carolina.¹ The order also stated that "[t]he parties may submit briefs by July 24, 2008 on the issue of whether the conspiracy count should be dismissed. On 29 July 2008, Judge Jones granted the motion to dismiss plaintiffs' civil conspiracy claim against Nichols and Powers based upon his partial summary judgment order. This order was revised on 12 August 2008 to include a Rule 54(b) certification. Plaintiffs appeal Judge Thigpen's order setting aside the judgment and Judge Jones' order dismissing plaintiffs' civil conspiracy claim.

II. Rule 60(b) Order

[1] In their first argument, plaintiffs contend that the trial court erred by concluding that Lisa's actions constituted "excusable neglect" pursuant to Rule 60(b)(1) and entering an order vacating the judgment. We disagree.

A. Standard of Review

This Court has stated:

The decision whether to set aside a default judgment under Rule 60(b) is left to the sound discretion of the trial judge, and

1. The basis of plaintiffs' civil conspiracy claim against Nichols and Powers was that they had used money improperly taken from EAI to purchase the property located on 303 Rosemont Street.

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will not be overturned on appeal absent a clear showing of abuse of discretion.

Whether neglect is “excusable” or “inexcusable” is a question of law The trial judge’s conclusion in this regard will not be disturbed on appeal if competent evidence supports the judge’s findings, and those findings support the conclusion.

JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., 169 N.C. App. 199, 202, 609 S.E.2d 487, 490 (2005) (internal citations omitted).

B. Analysis

Rule 60(b) of the North Carolina Rules of Civil Procedure provides, in relevant part, “[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . excusable neglect” N.C. Gen. Stat. 1A-1, Rule 60(b)(1) (2007). “To set aside a judgment on the grounds of excusable neglect under Rule 60(b), the moving party must show that the judgment rendered against him was due to his excusable neglect and that he has a meritorious defense.” *Scoggins v. Jacobs*, 169 N.C. App. 411, 413, 610 S.E.2d 428, 431 (2005) (quotation omitted).

While there is no clear dividing line as to what falls within the confines of excusable neglect as grounds for the setting aside of a judgment, what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case.

McIntosh v. McIntosh, 184 N.C. App. 697, 705, 646 S.E.2d 820, 825 (2007) (quotation omitted). Further, this Court has stated that:

provisions relating to the setting aside of default judgments should be liberally construed so as to give litigants an opportunity to have the case disposed of on the merits to the end that justice be done. *Any doubt should be resolved in favor of setting aside defaults so that the merits of the action may be reached.* However, statutory provisions designed to protect plaintiffs from defendants who do not give reasonable attention to important business affairs such as lawsuits cannot be ignored.

Howard v. Williams, 40 N.C. App. 575, 580, 253 S.E.2d 571, 573-74 (1979) (citations omitted) (emphasis added). This Court has upheld a trial court’s denial of a party’s motion for relief from judgment under Rule 60(b)(1) based upon the party’s failure to inform the court of a

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change of address and subsequent failure to appear. *See, e.g., Smith ex. rel. Strickland v. Jones*, — N.C. App. —, 645 S.E.2d 198 (2007); *PYA/Monarch, Inc. v. Ray Lackey Enterprises*, 96 N.C. App. 225, 385 S.E.2d 170 (1989); *Equipment Co. v. Albertson*, 35 N.C. App. 144, 240 S.E.2d 499 (1978). However, the facts recited in those cases do not reveal the extenuating circumstances present in the instant case.

A close examination of the facts found by the trial court, which are supported by competent evidence in the record, supports its conclusion that Lisa's actions constituted excusable neglect. Lisa did not inform the court, plaintiffs, nor plaintiffs' attorney of her new address in Virginia out of fear of continuing harassment and abuse by David. Plaintiffs mailed the requests for admissions, and other subsequent pleadings including plaintiffs' notice that the requested admissions stand as admitted, motion for summary judgment, and notice of hearing to the Browns Summit address. (R. 292). These documents were not served on any other party or counsel in the case in violation of Rule 5 of the Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 5(a) (2007) ("[E]very paper relating to discovery . . . , every written motion other than one which may be heard *ex parte*, and every written notice, . . . shall be served upon each of the parties[.]").

In its order, the trial court also made the following unchallenged finding of fact: "15. Both by her filed Answer and testimony before this Court, Defendant Lisa Elliott has demonstrated a meritorious defense to the Plaintiffs' action. In particular, Defendant Lisa Elliott denies embezzling money as alleged in the Complaint, and asserts that she is 51% owner of the Plaintiff Elliott Air, Inc." Because plaintiffs have failed to challenge this finding, it is deemed to be supported by competent evidence and is binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Liberalizing construing Rule 60(b), and in light of David's documented history of domestic abuse against Lisa and plaintiffs' violation of Rule 5, the trial court properly concluded that Lisa's actions constituted excusable neglect under Rule 60(b)(1) and that she has a meritorious defense. We hold the trial court did not abuse its discretion by vacating the judgment entered against her. This argument is without merit.

III. Motion to Dismiss

[2] In their second argument, plaintiffs contend that the trial court erred in granting Nichols and Powers' motion to dismiss EAI's civil

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conspiracy claim pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. We disagree.

“A Rule 12(b)(6) motion tests the legal sufficiency of the pleading.” *Sterner v. Penn*, 159 N.C. App. 626, 628, 583 S.E.2d 670, 672 (2003) (citations omitted).

When ruling upon a 12(b)(6) motion to dismiss, a trial court must determine as a matter of law whether the allegations in the complaint, taken as true, state a claim for relief under some legal theory. On appeal of a 12(b)(6) motion to dismiss for failure to state a claim, our Court “conduct[s] a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.”

Estate of McKendall v. Webster, — N.C. App. —, —, 672 S.E.2d 768, 770 (2009) (internal citation and quotation omitted). It is well-established that dismissal of a plaintiff’s claim is proper under Rule 12(b)(6) when one of the following three conditions is met: “(1) the complaint on its face reveals that no law supports the claim; (2) the complaint on its face reveals the absence of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim.” *Woolard v. Davenport*, 166 N.C. App. 129, 133, 601 S.E.2d 319, 322 (2004) (citation omitted).

This Court has defined civil conspiracy as “(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme.” *Strickland v. Hendrick*, — N.C. App. —, —, 669 S.E.2d 61, 72 (2008) (quotation omitted).

A threshold requirement in any cause of action for damages caused by acts committed pursuant to a conspiracy must be the showing that a conspiracy in fact existed. The existence of a conspiracy requires proof of an agreement between two or more persons. Although civil liability for conspiracy may be established by circumstantial evidence, the evidence of the agreement must be sufficient to create more than a suspicion or conjecture in order to justify submission to a jury.

Dove v. Harvey, 168 N.C. App. 687, 690-91, 608 S.E.2d 798, 801 (2005) (quotation omitted), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 249 (2006).

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In the instant case, plaintiff twice alleged conspiracy against Nichols and Powers in the complaint, once specifically in Paragraph 14 and once generally against all defendants in Paragraph 33. In Paragraph 14 of plaintiffs' complaint, EAI alleged that Nichols and Powers conspired with Lisa to purchase a house with improperly obtained funds:

14. Defendant Lisa L. Elliott in combination and conspiracy with her sister, defendant Diane K. Nichols, and her mother, defendant Karen Powers, used money improperly taken by her from plaintiff Elliott Air, Inc., in the manner described above, and invested it in the purchase of a house and lot located at 303 Rosemont Street, Gibsonville, Alamance County, North Carolina, which was acquired on July 14, 2006, by deed recorded in Book 2438, Page 596-598, Alamance County Registry of Deeds. Defendant Diane K. Nichols is the grantee of this deed. Defendant Karen Powers occupies this property as her homeplace.

However, on 24 July 2008, Judge Jones entered a partial summary judgment order in favor of Nichols and Powers resolving the specific allegations contained in Paragraph 14:

[T]here is no genuine issue of material fact with regard to the funds, represented by two checks paid to Diane Nichols on February 22, 2005, and April 17, 2005 for \$10,000.00 and \$44,000.00 respectively. These funds are the proceeds of the bona fide sale of Karen Powers' real property, and the Plaintiffs have no claim at law or in equity on either those funds or the real property located at 303 Rosemont Street in Gibsonville, North Carolina.

The partial summary judgment order dismissed with prejudice plaintiffs' claims for recovery of \$54,000.00 and their claim against the property located at 303 Rosemont Street.

Subsequently, on 29 July 2008, the trial court entered its Rule 12(b)(6) order dismissing EAI's civil conspiracy claim and specifically referenced the prior partial summary judgment order: "In paragraph 14 of the Complaint, Plaintiff alleged that Nichols and Powers conspired with Lisa Elliott to purchase a house with improperly obtained funds. However, summary judgment as to these funds (\$54,000.00) was granted to Nichols and Powers on July 24, 2008." Plaintiffs failed to appeal Judge Jones' partial summary judgment order. As such, this Court is precluded from reviewing that

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ruling and it remains undisturbed. See *Warner v. Brickhouse*, 189 N.C. App. 445, 449, 658 S.E.2d 313, 316 (2008) (“[T]he appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken.” (quotation omitted)).

Because the specific allegations contained in Paragraph 14 were resolved by the prior partial summary judgment order, the remaining allegation of civil conspiracy contained in Paragraph 33 of plaintiffs’ complaint must sufficiently plead that cause of action against Nichols and Powers. Paragraph 33 of the complaint states:

33. Each of the defendants agreed with defendant Lisa L. Elliott to do unlawful acts, consisting of wrongfully taking the funds and property of plaintiff Elliott Air, Inc.; one or more of the parties to the agreement committed overt acts in furtherance of the aims of the agreement; and plaintiff Elliott Air, Inc., suffered actual injury as a proximate result of the overt acts committed in furtherance of the conspiracy.

Our Supreme Court has stated, “[w]e must judge the sufficiency of the complaint by the facts alleged and not by pleader’s conclusions. The repeated use of the words combined, conspired, and agreed together to injure the plaintiff, are but conclusions of the pleader and without the allegation of the overt acts the complaint is insufficient to state a cause of action” *Shope v. Boyer*, 268 N.C. 401, 405, 150 S.E.2d 771, 774 (1966) (citations omitted)); see also *Dove*, 168 N.C. App. at 690, 608 S.E.2d at 800 (“In civil conspiracy, recovery must be on the basis of *sufficiently alleged wrongful overt acts*. The charge of conspiracy itself does nothing more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts and conduct of one might be admissible against all.” (quotation omitted) (emphasis added)). In the instant case, the only factual allegation regarding any conspiracy with Nichols and Powers is contained in paragraph 14 of plaintiffs’ complaint. This contention has been resolved by Judge Jones’ partial summary judgment order. No other wrongful overt acts are alleged to have been committed by any of the defendants in furtherance of the alleged conspiracy between Lisa, Nichols, and Powers.² We hold that plaintiffs’ blanket and con-

2. We note that plaintiffs’ complaint alleges that Lisa, *inter alia*, “embezzled, cashed forged checks, and otherwise converted to her own use a large amount of the funds of plaintiff [EAI].” However, plaintiffs do not allege these acts were done in furtherance of any conspiracy with Nichols and Powers.

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clusory allegations in paragraph 33 are insufficient to state a claim of civil conspiracy.

Accordingly, as plaintiffs' complaint on its face reveals the absence of facts sufficient to make a valid claim, the trial court properly dismissed plaintiffs' claim for civil conspiracy against Nichols and Powers. This argument is without merit.

AFFIRMED.

Judges HUNTER, Robert C. and GEER concur.

CLAUDETTE FONVILLE, Employee, PLAINTIFF-APPELLANT v. GENERAL MOTORS CORP., D/B/A GMAC, EMPLOYER, SELF-INSURED (SEDGWICK CLAIM MANAGEMENT SERVICE, SERVICING AGENT), DEFENDANT-APPELLEE

No. COA09-120

(Filed 6 October 2009)

1. Workers' Compensation— disability payments—unilateral termination

The Industrial Commission erred in a workers' compensation case by determining that plaintiff was not entitled to disability compensation through the date she returned to work where defendant had been making payments pursuant to a Form 60 but unilaterally stopped payments without informing the Commission. Payment of compensation pursuant to a Form 60 constitutes payment pursuant to an award of the Commission, and once compensation under an award of the Commission begins, payments can only be stopped under certain circumstances and after following specific procedures.

2. Workers' Compensation— late penalty—unilateral termination of benefits

The portion of an Industrial Commission award denying a workers' compensation plaintiff a late payment penalty was remanded for a determination of the amount of late fees due where defendant unilaterally suspended payments that were due to plaintiff while a valid award of the Commission was still in effect.

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3. Workers' Compensation— maximum medical improvement—evidence sufficient

The Industrial Commission did not err in a workers' compensation case in its determination of when maximum medical improvement was reached where the finding was fully supported by competent evidence.

4. Workers' Compensation— additional compensation denied—maximum medical improvement

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff was not entitled to additional medical treatment under N.C.G.S. § 97-25 where the evidence indicated that plaintiff had reached maximum medical improvement. There is nothing in the Commission's conclusion that would foreclose plaintiff from requesting additional treatment pursuant to N.C.G.S. § 97-25.1 before the statute of limitations runs.

Appeal by plaintiff from Opinion and Award entered 10 September 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 August 2009.

Prather Law Firm, by J.D. Prather, for plaintiff-appellant.

Rudisill, White & Kaplan, by Bradley H. Smith, for defendant-appellee.

CALABRIA, Judge.

Claudette Fonville ("plaintiff") appeals from an Opinion and Award entered by the North Carolina Industrial Commission ("the Commission") denying plaintiff's claim for temporary total disability and medical benefits. We affirm in part and reverse and remand in part.

I. Facts

On 13 July 2005, plaintiff, an employee of General Motors Corp., d/b/a GMAC ("defendant"), was injured while attending an employee appreciation luncheon. Plaintiff was struck in the head by the end of a tent pole. Defendant admitted compensability of the injury by filing a Form 60 with the Commission on 13 October 2005.

Plaintiff received medical treatment for her injury from a variety of medical providers from 13 July 2005 until 12 October 2005, when

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Dr. Alvin Lue (“Dr. Lue”), her family physician, released her to work for twenty hours per week or four hours per day. After two days of work, plaintiff complained that looking at her computer caused pain in her head and left eye. Dr. Lue removed plaintiff from work and advised her to see an ophthalmologist. On 31 October 2005, after plaintiff’s visit to an ophthalmologist, Dr. Lue released plaintiff to return to work two hours per day.

On 2 November 2005, plaintiff returned to Dr. Lue complaining of persistent headaches that made it impossible for her to work. Dr. Lue referred plaintiff to Dr. Carlo Yuson (“Dr. Yuson”), a neurologist. Dr. Yuson determined that plaintiff’s headaches were the result of uncontrolled high blood pressure. On 29 November 2005, Dr. Yuson released plaintiff to return to work beginning 2 January 2006, with the belief that she would reach maximum medical improvement (“MMI”) at that time.

On 22 November 2005, plaintiff was terminated by defendant for reasons unrelated to the injury she sustained. Defendant unilaterally discontinued plaintiff’s total disability compensation payments at the end of January 2006. Defendant did not file any form or otherwise inform the Commission of their decision to terminate plaintiff’s benefits. Plaintiff made no attempt to seek new employment from 2 January 2006 until September 2006. On 5 September 2006, plaintiff, through a temporary agency, found a job as a purchasing specialist, earning her pre-injury average weekly wage.

On 11 July 2006, plaintiff filed a request for hearing with the Commission. On 13 December 2007, an Opinion and Award was filed by Deputy Commissioner Chrystal Redding Stanback denying plaintiff’s claim for additional compensation for disability as a result of the 13 July 2005 accident. On appeal, the Full Commission (with Commissioner Christopher Scott dissenting) affirmed the Opinion and Award. Plaintiff appeals.

II. Standard of Review

This Court reviews an award from the Commission to determine: “(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact.” *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). The “Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony[;]” however, “findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to sup-

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port them.” *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citations and internal quotation marks omitted). “The Commission’s findings of fact are conclusive on appeal if supported by competent evidence. This is so even if there is evidence which would support a finding to the contrary.” *Sanderson v. Northeast Constr. Co.*, 77 N.C. App. 117, 121, 334 S.E.2d 392, 394 (1985) (citation omitted). The Commission’s conclusions of law are reviewed *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

III. Cessation of Disability Payments

[1] Plaintiff argues that the Commission erred by concluding as a matter of law that plaintiff was not entitled to payment of disability compensation through the date plaintiff returned to work on 5 September 2006. We agree.

It is undisputed that defendant, pursuant to N.C. Gen. Stat. § 97-18(b), filed a Form 60, “Employer’s Admission of Employee’s Right to Compensation,” and initiated payments of temporary total disability compensation to plaintiff. Under N.C. Gen. Stat. § 97-82(b),

Payment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, shall constitute an award of the Commission on the question of compensability of and the insurer’s liability for the injury for which payment was made. Compensation paid in these circumstances shall constitute payment of compensation pursuant to an award under this Article.

N.C. Gen. Stat. § 97-82(b) (2007). Thus, defendant’s payment of compensation pursuant to a Form 60 constitutes payment pursuant to an award of the Commission. “Payments of compensation pursuant to an award of the Commission shall continue until the terms of the award have been fully satisfied.” N.C. Gen. Stat. § 97-18.1(a) (2007).

Once the payment of compensation under an award of the Commission have been commenced, payments can only be terminated under certain circumstances and after following specific procedures. “An employer may terminate payment of compensation for total disability . . . when the employee has returned to work for the same or a different employer . . . or when the employer contests a claim pursuant to G.S. 97-18(d) within the time allowed thereunder.” N.C. Gen. Stat. § 97-18.1(b) (2007). Otherwise,

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An employer seeking to terminate or suspend compensation. . . for a reason other than those specified in subsection (b) of this section *shall notify the employee and the employee's attorney of record in writing of its intent to do so on a form prescribed by the Commission*. A copy of the notice shall be filed with the Commission. This form shall contain the reasons for the proposed termination or suspension of compensation, be supported by available documentation, and inform the employee of the employee's right to contest the termination or suspension by filing an objection in writing with the Commission within 14 days of the date the employer's notice is filed with the Commission or within such additional reasonable time as the Commission may allow.

N.C. Gen. Stat. § 97-18.1(c) (2007) (emphasis added).

In the instant case, defendant's termination of plaintiff's compensation was not due to plaintiff's return to work or a claim by defendant pursuant to N.C. Gen. Stat. § 97-18(d). Therefore, defendant was required to follow the procedure delineated in N.C. Gen. Stat. § 97-18.1(c) in order to terminate plaintiff's compensation.

Rule 404 of the Industrial Commission sets out the procedure for terminating compensation pursuant to 97-18.1(c). Rule 404 states, in relevant part:

[T]he employer or carrier/administrator shall notify the employee and the employee's attorney of record, if any, on Form 24, "Application to Stop Payment of Compensation." The employer or carrier/administrator shall specify the legal grounds and the alleged facts supporting the application[.]

. . .

If the employee or the employee's attorney of record, if any, objects by the date inserted on the employer's Form 24, or within such additional reasonable time as the Industrial Commission may allow, the Industrial Commission shall set the case for an informal hearing, unless waived by the parties in favor of a formal hearing.

Workers' Comp. R. of N.C. Indus. Comm'n 404(2), 2009 Ann. R. N.C. 761-62. The procedure delineated in Rule 404 ensures that an injured worker receives due process before ongoing compensation payments are terminated. This procedure was not followed by defendant in this

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case, and therefore defendant was not permitted to suspend payments to plaintiff until it either followed the requirements of N.C. Gen. Stat. § 97-18.1(c) and Rule 404(2) or until one of the requirements for termination under N.C. Gen. Stat. § 97-18.1(b) were met. Plaintiff returned to work on 5 September 2006 and it is on that date that defendant's obligation to make compensation payments terminated, pursuant to N.C. Gen. Stat. § 97-18.1(b) (2007).

Defendant argues that the Supreme Court's decision in *Clark v. Wal-Mart*, 360 N.C. 41, 619 S.E.2d 491 (2005), requires that plaintiff still prove "disability" in order to receive continued payments, even if defendant has admitted the "compensability" of plaintiff's injury. *Clark* is inapplicable to the instant case. In *Clark*, the employer admitted the injured employee's right to receive compensation pursuant to N.C. Gen. Stat. § 97-18(b), but disputed the permanent nature of the injury. *Id.* at 42, 619 S.E.2d at 492. Following the procedures established by the Workers' Compensation Act ("the Act") and the rules of the Commission, the employer filed a request for hearing on that issue. *Id.* The *Clark* Court held that when "disability" is disputed, the employer's admission of "compensability" of an injury does not create a presumption of continued disability for the employee. *Id.* at 44, 619 S.E.2d at 493. In the instant case, defendant never requested a hearing to formally dispute the permanent nature of plaintiff's disability. If defendant had followed the law and requested a hearing, it would have been plaintiff's burden to prove continued disability. Instead, defendant determined unilaterally that it could terminate, without due process, plaintiff's compensation payments, in violation of the Act and the established rules and procedures of the Commission.

Defendant argues that interpreting the Act in this way would allow plaintiff to receive disability compensation even though she was not, in fact, disabled, resulting in an unintended windfall for plaintiff. This argument ignores the fact that defendant's desired outcome could have easily been obtained by simply following the procedures delineated by the Act and the rules of the Commission. Even if defendant had filed, pursuant to Rule 404, a Form 24 several months after it believed plaintiff was no longer disabled, it would still be entitled to "retroactive termination or suspension of compensation to a date preceding the filing of a Form 24 . . . as a result of a formal hearing." Workers' Comp. R. of N.C. Indus. Comm'n 404(8), 2009 Ann. R. N.C. 762. The "absurd result" complained of by defendant does not result from our interpretation of the Act, but rather from defendant's

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failure to follow the Commission's clearly delineated procedures. Plaintiff is only entitled to compensation payments during the disputed period because defendant, after initiating payments pursuant to an award of the Commission, felt it could unilaterally suspend payments without regard to the Act, the rules of the Commission, or plaintiff's due process rights. Defendant cannot use a later determination that plaintiff was not disabled to justify its clear circumvention of established Commission procedures and plaintiff's due process rights. That portion of the Commission's Opinion and Award denying plaintiff compensation payments from 2 January 2006 through 5 September 2006 is hereby reversed and the matter remanded for a determination of the amount defendant owes plaintiff during that period.

IV. Late Payment Penalty

[2] Under N.C. Gen. Stat. § 97-18(g):

If any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

N.C. Gen. Stat. § 97-18(g) (2007). In the instant case, defendant unilaterally suspended payments that were due to plaintiff while a valid award of the Commission was still in effect. Defendant made no showing that these payments were not made due to conditions over which defendant had no control. Therefore, that portion of the Commission's Opinion and Award denying plaintiff a 10% late payment penalty for payments not paid by defendants when due between 2 January 2006 and 5 September 2006 is reversed and the matter remanded for a determination of the amount of late fees due to plaintiff as a result of defendant's failure to make timely payments.

V. Maximum Medical Improvement

[3] Plaintiff argues that the Commission erred by concluding that plaintiff reached MMI on 2 January 2006. We disagree.

In its Opinion and Award, the Commission found as fact and concluded as a matter of law that plaintiff reached MMI on 2 January

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2006. The Commission's finding of fact was fully supported by competent evidence. Plaintiff was seen by Dr. Yuson on 29 November 2005, at which time he wrote a letter stating that plaintiff was unable to return to work until 2 January 2006. Dr. Yuson's letter stated: "At this point I think that the patient is on the mend and I believe that she will be expected to be at MMI in (sic) January 2, 2006. At that point, she is released to full time duty." There is no medical evidence in the record that contradicts Dr. Yuson's conclusion or otherwise suggests plaintiff required additional treatment for her injury. The Commission also found as fact, undisputed by plaintiff, that plaintiff's testimony regarding her continuing symptoms was not credible and that plaintiff failed to seek any additional medical treatment after seeing Dr. Yuson on 29 November 2005. This evidence sufficiently supports the Commission's conclusion that plaintiff reached MMI on 2 January 2006. This assignment of error is overruled.

VI. Additional Medical Compensation

[4] Plaintiff argues that the Commission erred by concluding that plaintiff did not need and was not entitled to any additional medical treatment resulting from her injury. We disagree.

An employee may seek compensation under N.C. Gen. Stat. § 97-25 for additional medical treatment when such treatment "lessens the period of disability, effects a cure or gives relief." *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 541-42, 485 S.E.2d 867, 869 (1997) (citation omitted). Any claim for additional medical compensation must be made within "two years after the employer's last payment of medical or indemnity compensation" unless the employee, prior to the expiration of the two-year period, files a claim for additional medical compensation, or the Commission orders additional medical compensation on its own motion. N.C. Gen. Stat. § 97-25.1 (2007).

In the instant case, the Commission found as fact, supported by competent evidence, that plaintiff reached MMI on 2 January 2006. The Commission also found, supported by competent evidence, that no medical evidence existed that showed plaintiff either required any additional medical treatment after that date or that plaintiff suffered any permanent injury. Since the evidence indicated that plaintiff had reached MMI, there could be no medical treatment that would lessen the period of plaintiff's disability, effect a cure or otherwise give plaintiff relief. The Commission correctly concluded that plaintiff did not need and was not entitled to any additional medical treatment

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under N.C. Gen. Stat. § 97-25. Contrary to plaintiff's assertions, there is nothing in the Commission's conclusion that would foreclose plaintiff from requesting additional treatment pursuant to N.C. Gen. Stat. § 97-25.1 if such treatment became necessary before the applicable statute of limitations ran. This assignment of error is overruled.

VII. Conclusion

The portions of the Commission's Opinion and Award denying plaintiff compensation payments and late payment penalties from 2 January 2006 through 5 September 2006 are reversed and remanded for a determination of the amount owed to plaintiff by defendant. The remaining portions of the Opinion and Award are affirmed.

Affirmed in part, reversed in part, and remanded.

Judges BRYANT and ELMORE concur.

PARKDALE AMERICA, LLC, PLAINTIFF v. REGINALD S. HINTON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANT

No. COA09-10

(Filed 6 October 2009)

Taxation— sales and use tax—exemption—packaging materials

The trial court did not err in a sales and use tax case by granting summary judgment in favor of plaintiff because the packaging materials plaintiff used to ship goods to its customers qualified for the tax exemption under N.C.G.S. § 105-164.13(23)(b).

Appeal by defendant from order entered 13 August 2008 by Judge Nathaniel J. Poovey in Gaston County Superior Court. Heard in the Court of Appeals 31 August 2009.

Katten Muchin Rosenman LLP, by Deborah L. Fletcher and Christopher A. Hicks, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Tenisha S. Jacobs, for defendant-appellant.

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HUNTER, Robert C., Judge.

Defendant Reginald S. Hinton, the Secretary of the North Carolina Department of Revenue (“DOR”), appeals from the trial court’s entry of summary judgment in favor of plaintiff Parkdale America, LLC. DOR primarily argues that Parkdale failed to satisfy its burden of establishing that the packaging materials it uses to ship goods to its customers qualifies for an exemption under North Carolina’s sales and use tax, and, therefore, the trial court erred in granting summary judgment to Parkdale. Because we conclude that Parkdale’s packaging material is encompassed by the tax exemption, we affirm.

Facts

Parkdale manufactures and sells industrial yarn. As the yarn is spun, it is wound onto cones. To ship its cones of yarn to customers, Parkdale uses the “Yarn Pak,” which is manufactured by Shuert Industries, Inc. Parkdale’s sales contracts with its customers require the return of the Yarn Paks for recycling and reuse, and Parkdale retains ownership of the Yarn Paks.

The Yarn Pak consists of several interlocking components—a bottom pallet, a top pallet, and up to six dividers—that allow it to hold up to 100 individual cones of yarn. The bottom pallet of the Yarn Pak is approximately 55 inches long and 45 inches wide and made of high-density polyethylene. The bottom pallet is roughly 1/4 of an inch thick and weighs approximately 22 pounds. The plastic bottom is molded into a “grid pattern . . . to cradle dozens of different configurations of tubes and cones of yarn.” Around the circumference of the pallet is a lip extending upwards approximately three to four inches. The lip covers the bottom half of the yarn cones and, along with the molded indentations, holds the cones in place in the pallet.

After the yarn cones are placed in the Yarn Pak’s bottom pallet, a divider is placed on top of the cones. The divider is about 1/8 of an inch thick and weighs roughly seven pounds. Similar to the bottom pallet of the Yarn Pak, the divider is 55 inches long and 45 inches wide. Each divider also has a lip on all four sides that extends downward and covers 1 1/2 inches of the top of the yarn cones positioned in the bottom pallet. Up to seven layers of cones may be stacked in a Yarn Pak, using six dividers.

The Yarn Pak top pallet is similar to the bottom, made of polyethylene with molded indentations to fit around the cones of yarn.

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Like the bottom pallet and dividers, the top pallet is 55 inches long, 45 inches wide, and a 1/4 of an inch thick. It also weighs approximately 22 pounds. The top pallet also has a lip that extends roughly three inches downward on all four sides, holding the top layer of cones in place. Parkdale normally buys the Yarn Pak by the set, including the top and bottom pallets and the dividers.

After the cones of yarn are packed into the Yarn Pak, Parkdale typically wraps it in “shrink wrap,” overlapping the edges of the bottom and top pallets as well as the dividers. The shrink wrap is not part of the Yarn Pak and is not necessary to hold the Yarn Pak together. It is used as a protective barrier against dust and moisture during shipping.

Also, in some instances, Parkdale uses a single 1/2 inch plastic band, strapped vertically around the Yarn Pak for additional security. Whether Parkdale uses the plastic band is up to the customer and it routinely ships Yarn Paks without the band.

On 13 June 2006, DOR issued a Notice of Sales and Use Tax Assessment to Parkdale for the period of 1 January 2003 through 31 December 2005. DOR assessed Parkdale \$223,492.06 based on Parkdale’s purchase of the Yarn Packs. The total assessment included \$164,359.67 in taxes, \$41,089.92 in penalties, and \$18,042.47 in interest. Under protest, Parkdale paid \$186,875.06 in taxes and interest on 28 November 2006. In a 4 January 2007 letter, DOR waived the \$41,089.92 in penalties. When DOR denied Parkdale’s request to refund the taxes and interest paid, Parkdale filed suit to recover these amounts. After filing an answer generally denying Parkdale’s claim, DOR moved for summary judgment. In an order entered 13 August 2008, the trial court denied DOR’s motion and granted summary judgment to Parkdale, ordering DOR to refund Parkdale \$186,875.06, plus interest. DOR timely appealed to this Court.

Discussion

DOR argues that the trial court erred in granting summary judgment to Parkdale. On appeal, an order granting summary judgment is reviewed de novo. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006). “Summary judgment is appropriate if ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’” *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (quoting N.C. R. Civ. P. 56(c)).

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On appeal, DOR contends that it is entitled to judgment as a matter of law because Parkdale failed to establish that its Yarn Paks qualify for an exemption under the North Carolina Sales and Use Tax Act, N.C. Gen. Stat. § 105-164.1 *et seq.* (2007). Both DOR and Parkdale focus on N.C. Gen. Stat. § 105-164.13(23) (2007), which provides an exemption from the use tax for specified “packaging items.” Pertinent here, the statute provides an exemption for: “A container that is used as packaging by the owner of the container or another person to enclose tangible personal property for delivery to a purchaser of the property and is required to be returned to its owner for reuse.” N.C. Gen. Stat. § 105-164.13(23)(b) (“section (23)(b)”). Parkdale, as the party “claim[ing] an exemption or exception from tax coverage,” bears the “burden of bringing [it]self within the exemption or exception.” *Canteen Service v. Johnson, Comr. of Revenue*, 256 N.C. 155, 163, 123 S.E.2d 582, 587 (1962).

At oral argument, DOR conceded that, for purposes of section (23)(b), a Yarn Pak is a “container”; that it is “used as packaging”; that it holds “tangible personal property”; and that it is “required to be returned to [Parkdale] for reuse.” DOR claims, however, that Parkdale is not entitled to the exemption because “[t]he plain language [of the statute] only exempts containers that *enclose* tangible personal property.” (Emphasis added.)

“A question of statutory interpretation is ultimately a question of law” and the first principle of statutory interpretation is to “ascertain the intent of the legislature and to carry out such intention to the fullest extent.” *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998) (internal citations and quotation marks omitted); *accord Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952) (“The legislative intent is the essence of the law and the guiding star in the interpretation thereof.”). The primary “consideration in determining legislative intent is the words chosen by the legislature.” *O & M Indus. v. Smith Eng’r Co.*, 360 N.C. 263, 267-68, 624 S.E.2d 345, 348 (2006). In interpreting statutes, courts “first determine whether the statute is clear and unambiguous, and if so, [the court] appl[ies] the words in their plain and definite meaning.” *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007). Only where the statutory language is ambiguous is “judicial construction [necessary] to ascertain the legislative will.” *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990).

Neither party contends that section (23)(b)’s use of “enclose” is ambiguous, nor do we perceive the term to be ambiguous. Instead, as

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the term is not defined in the statute, the parties focus on the ordinary meaning of the word. “Where words of a statute are not defined, the courts presume that the legislature intended to give them their ordinary meaning determined according to the context in which those words are ordinarily used.” *Regional Acceptance Corp. v. Powers*, 327 N.C. 274, 278, 394 S.E.2d 147, 149 (1990). Where, as here, there is no “contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute.” *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000).

The word “enclose” is defined as: “to close in”; “to fence off or in”; or “to seize or grasp securely: hold.” *Webster’s Third New International Dictionary* 746 (1968). In *State v. Cockerham*, 155 N.C. App. 729, 574 S.E.2d 694, *disc. review denied*, 357 N.C. 166, 580 S.E.2d 702 (2003), this Court similarly relied on the dictionary definition of the word “enclose” in interpreting a criminal statute, noting that the term means “[t]o surround on all sides; fence in; close in”; or “[t]o contain, especially as to shelter or hide” *Id.* at 734, 574 S.E.2d at 698 (quoting *The American Heritage Dictionary of the English Language* 430 (1978)) (first and second alterations added).

As the trial court observed at the summary judgment hearing, the Yarn Paks satisfy all the definitions of “enclose” set out in *Cockerham* except the definition that they “surround on all sides.” The color photographs in the record support this conclusion, showing the Yarn Paks as comprising a bottom pallet and a top pallet, each with a lip of several inches that covers the cones of yarn. The pallets also have molded indentations in them so that when the cones and dividers are layered, the pallets, cones, and dividers lock into place. When properly stacked so that the components are interlocking, if the Yarn Pak is placed on its side, the yarn cones do not fall out. Thus the Yarn Pak is a container that “encloses” tangible personal property, qualifying for the section (23)(b) tax exemption.

Focusing on *Cockerham’s* definition that to “enclose” means “[t]o surround on all sides,” *id.*, DOR appears to argue that in order for the Yarn Paks to “enclose” the yarn cones, the Yarn Paks must completely or fully enclose them, without “leav[ing] the yarn exposed between the pallets and separators.” Adopting DOR’s position that a container must “completely” or “fully” enclose property in order to qualify for the exemption would effectively add language to N.C. Gen. Stat. § 105-164.13(23)(b) not adopted by the Legislature. This Court

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has “no power to add to or subtract from the language of the statute.” *Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950).

Moreover, the three to four inch lip that runs around the circumference of the bottom and top pallets of the Yarn Pak do, in fact, surround the cones on all sides. That the lips do not completely or fully encapsulate the cones does not mean that they are not “enclosed” for purposes of section (23)(b). As the trial court remarked: “If you have got a horse and you want to fence him in or enclose him, then you fence him in but that doesn’t mean you can’t stick your hand through the fence.”

In arguing that the General Assembly must have intended to exclude “packaging items” like the Yarn Pak from the exemption in section (23)(b), DOR relies extensively on legislative committee reports and communications between DOR and the committee considering the proposed exemption. Our Supreme Court has stressed, however, that “[i]n determining legislative intent, [courts] do[] not look to the record of the internal deliberations of committees of the legislature considering proposed legislation.” *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 657, 403 S.E.2d 291, 295 (1991). Nor is “[t]estimony, even by members of the Legislature which adopted the statute, as to its purpose and the construction intended to be given by the Legislature to its terms, . . . competent evidence upon which the court can make its determination as to the meaning of the statutory provision.” *Milk Commission v. Food Stores*, 270 N.C. 323, 332-33, 154 S.E.2d 548, 555 (1967). Thus the committee reports and memoranda are not proper considerations in interpreting N.C. Gen. Stat. § 105-164.13(23)(b). See *N.C. Dep’t of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 202, 675 S.E.2d 641, 650 (2009) (“declin[ing]” to consider as indicative of legislative intent committee’s version of bill omitting certain provision).

In any event, the concern expressed in the communications between DOR and the legislative committee was whether the language in the proposed legislation was overly broad in that it might exempt “railroad pallets” from the use tax. Although the Yarn Pak is in part comprised of a bottom and top “pallet,” the Yarn Pak as a whole is distinct from railroad pallets, which are used as skid plates to transport heavy objects other than cones of yarn. Our holding in this case relates only to Yarn Paks—not railroad pallets.

In support of its argument that the Yarn Paks do not “enclose” property as that term is used in section (23)(b), DOR cites to *In re*

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Clayton-Marcus Co., 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974), where the Supreme Court held that “a provision in a tax statute providing an exemption from the tax, otherwise imposed, is to be construed strictly against the taxpayer and in favor of the State.” As the Court in *Clayton-Marcus* further explained, however, this “rule[] come[s] into play . . . only when there is ambiguity in the statute. When the meaning of the statute is clear, there is no need for construction and the clear intent of the Legislature must be given effect by the courts.” *Id.* Thus, the “special canons of statutory construction” that apply “[w]hen the [ambiguous] statute under consideration is one concerning taxation,” do not apply in this case, where the tax statute is unambiguous. *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001).

DOR also contends that “[b]ecause [DOR] is charged with the duty to interpret the Revenue Laws of the State, its interpretation of N.C. Gen. Stat. § 105-164.13(23)b is *prima facie* correct.” “While it is true one of the most significant aids to construction in determining the meaning of a revenue law is the interpretation given such act by the administrative agency charged with its enforcement, . . . [i]t is only in cases of doubt or ambiguity that the courts may allow themselves to be guided or influenced by an executive construction of a statute.” *Watson Industries*, 235 N.C. at 211, 69 S.E.2d at 511 (internal citations and quotation marks omitted); *accord In re Total Care, Inc.*, 99 N.C. App. 517, 520, 393 S.E.2d 338, 340 (“Although where an issue of statutory construction arises the construction adopted by the agency charged with implementing the statute may be considered, such an issue only arises where an ambiguity exists.”), *disc. review denied*, 327 N.C. 635, 399 S.E.2d 122 (1990). Where, as here, the statutory language at issue is not ambiguous, it is the statute’s plain language, not an agency’s interpretation of it, that controls. *See N.C. Dep’t of Corr.*, 363 N.C. at 202-03, 675 S.E.2d at 650 (concluding agency’s “interpretation of the statute at issue is irrelevant” where legislative intent can be “derived from the plain language of the statute”). We, therefore, conclude that Parkdale’s Yarn Paks qualify for the tax exemption under N.C. Gen. Stat. § 105-164.13(23)(b) and affirm the trial court’s entry of summary judgment to Parkdale.

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

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PHILLIP McMILLAN, JANET CONNELL, TRACY TURNER, CARROLL C. TURNER, DALE DRAKE, REGINALD DRAKE, BOBBIE WILSON, J. BRUCE WILSON, MARGARET WILSON, GEORGIA C. MARX, MELVIN MARX, JOHN EARL FOY, RUTH P. FOY, STEVE K. PERRY, KIPP COX, NANCY MADAR, PAUL MADAR, JOAN R. POST, KARL A. WILLIAMS, BARBARA A. WILLIAMS, GUNTHAM M. GERSCH, STANLEY BRIGHTWELL, ALAN LURIA, PAT RYAN, EARL A. BETTINGER, J. RANDALL GROBE, PETITIONERS v. TOWN OF TRYON, AN INCORPORATED MUNICIPALITY OF THE STATE OF NORTH CAROLINA, TOWN COUNCIL FOR THE TOWN OF TRYON, AND THE TRYON COUNTRY CLUB, INC., RESPONDENTS AND DEFENDANTS, RESPONDENTS

No. COA08-642

(Filed 6 October 2009)

Zoning—standing—special damages

The superior court erroneously dismissed for lack of standing petitioners' appeal from the Town Council's approval to re-zone property to allow further development. There was testimony sufficient to establish petitioners' standing with special damages resulting from water runoff, septic tank pollution, increased noise, increased traffic on narrow roadways, and danger to petitioners and neighborhood children on the roadways.

Appeal by petitioners from an order entered 14 February 2008 by Judge J. Marlene Hyatt in Polk County Superior Court. Heard in the Court of Appeals 3 December 2008.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus; and Whitmire & Beeker, by Angela Beeker, for petitioners-appellants.

Parker Poe Adams & Bernstein L.L.P., by Anthony Fox, Benjamin R. Sullivan and Benn A. Brewington, III, for respondents-appellees.

JACKSON, Judge.

Phillip McMillan ("McMillan"), Janet Connell, Tracy Turner, Carol C. Turner, Dale Drake, Reginald Drake ("Drake"), Bobbie Wilson, J. Bruce Wilson ("Wilson"), Georgia C. Marx, Melvin Marx, John Earl Foy, Ruth P. Foy, Steve K. Perry, Kipp Cox, Nancy Madar, Paul Madar, Joan R. Post, Karl A. Williams, Barbara A. Williams, Guntham M. Gersch, Stanley Brightwell, Alan Luria, Pat Ryan, Earl A. Bettinger, and J. Randall Grobe (collectively, "petitioners") appeal from an order entered by the superior court on 14 February 2008 dismissing their appeal upon a writ of *certiorari* to the trial court to review

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actions taken by the Town of Tryon (“Town”), Town Council for the Town of Tryon (“Town Council”), and the Tryon Country Club, Inc. (“Country Club”) (collectively, “respondents”). For the reasons set forth below, we reverse and remand.

The instant appeal concerns the Town’s re-zoning of approximately 126 acres of Country Club property—all of which is located within the Town’s municipal boundaries or subject to the Town’s zoning authority—to allow the development of sixty new residential homes.

On 17 October 2006, the Town Council denied a proposal to re-zone the Country Club property. After waiting the required three months, the proposal was resubmitted with additional information. On 20 March 2007, the Town Council conducted a hearing to consider re-zoning approximately 126 acres of the Country Club property from “P-1” and “R-3” zones to an “R-4 Conditional Use Zone” such that it would be possible to build a mixture of single-family units as well as duplexes in a portion of the re-zoned area upon the issuance of a Conditional Use Permit. A P-1 district provides for open spaces, and an R-3 zone is among the Town’s most restrictive residential districts and allows the development of single-family, detached dwelling units along with other residentially related facilities which serve the residents within the district. An R-4 Conditional Use Zone is less restrictive and allows a mixture of multi-family dwelling units on individual lots.

The Country Club and developers from dewSouth Communities (“dewSouth”) planned to develop approximately sixty new residential homes and a new tennis and swimming facility for the Country Club on approximately fifty-one of the 126 re-zoned acres. The sixty new residential units were to be comprised of forty single family residences and ten duplexes. Without re-zoning the R-3 district to an R-4 Conditional Use Zone and issuing a Conditional Use Permit, the duplexes would be an unlawful use of the land.

After hearing sworn testimony from Town residents; Country Club residents; petitioners McMillan, Drake, and Wilson; architects and other members of the dewSouth development team, the Town Council unanimously voted in favor of re-zoning a portion of the Country Club property to an R-4 Conditional Use Zone. The Town Council also unanimously voted to approve the associated Conditional Use Permit necessary to allow the proposed development of the re-zoned property.

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On 20 April 2007, petitioners filed a complaint¹ and petition for writ of *certiorari* seeking review of the 20 March 2007 hearing. On 11 June 2007, the superior court granted the petition. On 10 July 2007, respondents filed an answer and raised as a defense petitioners' purported lack of standing. On 11 July 2007, the parties submitted to the superior court the record of the Town Council's proceedings at the 20 March 2007 hearing. On 19 December 2007, petitioners filed a motion to supplement the record on appeal with (1) a transcript of the Town Council's 20 March 2007 hearing, (2) petitioners' affidavits attesting to adverse pecuniary effects on their properties if the proposed development were to occur pursuant to the Conditional Use Permit, and (3) minutes from the Town Council's 17 October 2006 meeting during which a similar re-zoning proposal had been considered.

On 9 January 2008, petitioners' motion came on for hearing, and on 14 February 2008, the trial court entered an order (1) granting petitioners' motion to supplement the record with a transcript of the Town Council's 20 March 2007 hearing, (2) denying petitioners' motion to supplement the record with affidavits of adverse pecuniary effects resulting from the decisions to re-zone and grant a Conditional Use Permit, (3) denying petitioners' motion to supplement the record with minutes from the Town Council's 17 October 2006 meeting, and (4) dismissing petitioners' appeal for lack of subject matter jurisdiction because petitioners' had failed to demonstrate that they had standing to bring the appeal. From the superior court's dismissal of their appeal for lack of standing, petitioners appeal to this Court.

On appeal, petitioners argue that the superior court erred by dismissing their appeal for lack of standing. We agree.

We conduct a "de novo review of a motion to dismiss for lack of standing[;] we view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008) (citing *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 477, 495 S.E.2d 711, 713, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998)).

North Carolina General Statutes, section 160A-381, subsection (c) allows review by the superior court in the nature of *certiorari* of a decision by a city council or planning board to issue a conditional

1. Issues related to petitioners' complaint are not considered on this appeal, but are addressed in a related appeal filed contemporaneously herewith with our file number 08-1253.

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use permit. N.C. Gen. Stat. § 160A-381(c) (2007). However, section 160A-381, subsection (c) is subject to North Carolina General Statutes, section 160A-388. *Id.* Section 160A-388 sets forth the requirement, *inter alia*, that an aggrieved party bring the action. *See* N.C. Gen. Stat. § 160A-388(b) and (e2) (2007).

In *Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969), our Supreme Court explained the standing requirements for challenging a zoning amendment:

[t]he mere fact that one's proposed lawful use of his own land will diminish the value of adjoining or nearby lands of another does not give to such other person a standing to maintain an action, or other legal proceeding, to prevent such use. . . . If, however, the proposed use is unlawful, as where it is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have a standing to maintain such proceeding.

Jackson, 275 N.C. at 161, 166 S.E.2d at 82 (internal citations omitted). The Court further explained that the prohibited use of land remains unlawful without a valid zoning ordinance amendment. *Jackson*, 275 N.C. at 161, 166 S.E.2d at 83 (citations omitted).

In *Mangum*, our Supreme Court recently interpreted the rules set forth above and noted that “[i]t is undisputed that defendants’ proposed use of the land is unlawful unless they are issued a Special Use Permit.” *Mangum*, 362 N.C. at 643, 669 S.E.2d at 282. The Court held that the petitioners’ allegations in their petition for writ of *certiorari* as well as the evidence presented “in regards to the ‘increased traffic, increased water runoff, parking, and safety concerns,’ as well as the secondary adverse effects on petitioners’ businesses, were sufficient special damages to give standing to petitioners to challenge the issuance of the permit.” *Mangum*, 362 N.C. at 644, 669 S.E.2d at 282-83.

The Court explained that the “petitioners alleged that they either owned property immediately adjacent to or in close proximity to the subject property” and that, while such allegations standing alone are insufficient, proximity to the property that is the subject of a variance “bears some weight” on determining whether the petitioner has suffered or will suffer special damages necessary for standing. *Mangum*, 362 N.C. at 644, 669 S.E.2d at 283. The Court then detailed the peti-

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tioners' further allegations and testimony before the Board of Adjustment relating to the "vandalism, safety concerns, littering, trespass, and parking overflow from the proposed business to adjacent or nearby lots" that would be exacerbated by the Board of Adjustment's decision to grant a variance. *Mangum*, 362 N.C. at 645-46, 669 S.E.2d at 283-84. The Court concluded that petitioners' had demonstrated likely adverse effects on the petitioners' property values and use of their property sufficient to allege standing sufficient to survive a motion to dismiss. *Id.*

In the case *sub judice*, petitioners' expressly alleged that

[p]etitioners are property owners whose property lies adjacent to, within the neighborhood surrounding, or within the vicinity of the Property [that is subject to a conditional use permit], and therefore Petitioners have a specific personal and legal interest in the matter and are directly and adversely affected by the Legislative Decision of the Town of Tryon, by and through its Town Council on March 30, 2007 with respect to the Property. Petitioners will suffer special damages separate and distinct from the rest of the properties lying within the County of Polk and/or the Town of Tryon, if the Quasi-judicial Decision referenced hereinabove and hereinbelow are allowed to stand (including but not limited to diminution in property values), and are therefore persons aggrieved within the meaning of N.C.G.S. § 160A-388[.]

Petitioners based the foregoing allegation in substantial part upon testimony given by McMillan at the 20 March 2007 hearing. Having solicited speaking time from other petitioners, McMillan testified in opposition to the re-zoning and Conditional Use Permit in relevant part as follows:

This change of zoning proposal will facilitate the sale and removal of substantially all of the [C]lub's natural area, and probably replace the natural area with roads, driveways, rooftops, lawns and septic systems. All of these greatly increase the water runoff and the—and/or the pollution.

. . . .

We talked about infrastructure problems. Country Club Road needs to be widened. . . . I've got some pictures in the little booklet that [has been] passed out to you, and it shows a picture of a school bus coming down the road, and a school bus is eight feet wide, and there are plenty of areas where the lane entering the

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Tryon—into the Tryon Country Club Road [which] is only seven feet wide. So do the math. . . . When I see a child walking or riding his bike to the [C]lub, I take a moment to pray that he gets there without getting hit by a car. The residents of the area know better than to walk the road. At times, there's not even enough room on the side of the road to step off of the road, because you'd be stepping right into a ditch. So you can't even get out of the way of a car that's coming. Adults know better, but kids, especially with this new wonderful swimming pool and tennis courts and all, they think that we know what we're doing, and so they just stay on the road and they assume that we'll not hit them. But in the case of this road, it's not an option.

. . . .

We also talked about lifestyle problems. Approximately 85 percent of the neighborhood does not want the zoning changed—the zoning changed, more noise, dangerous traffic, too many units in the neighborhood, unsightly—completely changes the character of the [C]lub and the neighborhood.

. . . .

[A]ccording to the long-time local residents, there's a number of natural springs in the building site. This will particularly cause problems with septic (inaudible) use.

. . . .

I believe that we have shown that this project is potentially detrimental to public health: pollution, unsafe roads; detrimental to the general welfare of the neighborhood: the property owners don't want it; and for the same reason, does not enhance the quality of life in the neighborhood.

As in *Mangum*, it is undisputed that dewSouth's proposed development will be unlawful without an amendment to the Town's zoning ordinances and the issuance of a Conditional Use Permit. Furthermore, in conjunction with the allegations of proximity contained in the petition, McMillan's testimony is sufficient to establish petitioners' standing with special damages resulting from water runoff, septic tank pollution, increased noise, increased traffic on narrow roadways, and the danger to petitioners and neighborhood children on the roadways—many of the same concerns our Supreme Court recently found to be persuasive in *Mangum*. See *Mangum*, 362 N.C. at 644-45, 669 S.E.2d at 282-83 (listing, *inter alia*, increased water

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runoff, insufficient parking space, and danger to customers and employees from increased traffic). Accordingly, upon our *de novo* review of the lower court's conclusion that petitioners lacked standing, taking petitioners' allegations as true, viewing the facts in the light most favorable to them, and with due regard for the Supreme Court's recent precedent in *Mangum*, we hold that the lower court erroneously dismissed petitioners' action for lack of standing.

Because the sole issue before this Court is whether petitioners had standing, and because we have resolved that issue in petitioners' favor, we do not address petitioners' questions presented as to whether the trial court erred by denying petitioners' motions to supplement the record with (1) affidavits attesting the pecuniary impact on their properties of the proposed development, and (2) the minutes of the 17 October 2006 meeting.

It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter.

Poore v. Poore, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931) (citations omitted).

For the foregoing reasons, we hold that the superior court erred in dismissing petitioners' appeal pursuant to a writ of *certiorari* for lack of standing and we remand the matter to that court.

Reversed and remanded.

Judges HUNTER and ELMORE concur.

STATE OF NORTH CAROLINA v. ASIA NIANGEL SPRINGS

No. COA09-158

(Filed 6 October 2009)

1. Evidence—credibility—improper opinion

The trial court erred in a controlled substances case by improperly expressing an opinion that tended to discredit defendant's defense theory. The trial court's statements unintentionally suggested that it had already assessed the credibility of defend-

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ant's evidence and found it lacking. The remark was prejudicial because it went to the heart of the theory of defense.

2. Constitutional Law— double jeopardy—convictions for possession of a controlled substance and possession of a controlled substance with intent to sell or deliver

Defendant's right to be free from double punishment was not impaired based on her convictions for both felony possession of marijuana and felony possession with intent to sell or deliver marijuana.

Appeal by defendant from judgments entered 21 August 2008 by Judge Michael E. Helms in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 August 2009.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Granberry Corbett, for the State.

Daniel F. Read for defendant.

ELMORE, Judge.

Asia Niangel Springs (defendant) was found guilty by a jury of possession with intent to sell or deliver a controlled substance (marijuana), felony possession of a controlled substance (marijuana, more than one and a half ounces), intentionally keeping and maintaining a dwelling house for the keeping or selling of a controlled substance (marijuana), and possessing with intent to use drug paraphernalia. Defendant was sentenced to thirty days in the custody of the Mecklenburg Sheriff for the misdemeanor paraphernalia charge, six to eight months in the custody of the Department of Corrections (DOC) for possession with intent to sell or deliver, six to eight months in the DOC's custody for felony possession, and six to eight months in the DOC's custody for maintaining a dwelling house for the keeping or selling of marijuana. The three prison sentences were imposed consecutively and suspended; defendant was placed on supervised probation for 108 months. Defendant now appeals.

On 6 June 2006, Officer Christopher Edward Lyon, a community officer with the Charlotte-Mecklenburg Police Department, received a call from the manager of the Arbor Glen Apartments, Jacqueline Brooker. Brooker asked Officer Lyon to meet her at defendant's apartment because Brooker had found drugs in it during a scheduled inspection. Brooker provided Officer Lyon with a photo showing a

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bag of marijuana on a coffee table inside defendant's apartment. Officer Lyon called three other officers to secure the apartment while he obtained a search warrant.

As this was happening, defendant's boyfriend, Tavarus Greer, called defendant and told her that the police were at the apartment; at the time, defendant was being driven home from work by a co-worker, Chantike Carothers. Greer had a key to defendant's apartment and would often stay there during the day playing video games. Carothers, who was Greer's cousin, testified that Greer frequently sold marijuana, although defendant had told him not to keep his drugs at her apartment. Soon after defendant arrived at her apartment, Greer, driving defendant's car, returned to the scene. Officer P.B. Rainwater told defendant that she could not enter the apartment because it was under investigation. Officer Rainwater allowed her to sit in her apartment once she signed a consent to search form. Defendant told Officer Rainwater that she did smoke marijuana for her own use, but that she always had less than \$20.00 worth.

Officers proceeded to search the apartment and found a bag of marijuana on the coffee table, a digital scale and thirteen bags of marijuana in the kitchen, and two more bags of marijuana in the bedroom; the total weight of the marijuana was approximately 371 grams. Greer was present when Officer Rainwater questioned defendant about the drugs. Defendant admitted to Officer Rainwater that the drugs and scale were hers; however, she testified at trial that the drugs and scale were actually not hers, and that she had lied to Officer Rainwater because she was afraid of Greer, whom she said had "anger problems" and had previously hit her and threatened, "Go ahead, just point your finger at me." Just before the officers searched the apartment, Greer told defendant that he had hidden a gun under her couch, and defendant disclosed this information to Officer Rainwater, who retrieved the gun.

At trial, the defense's principal theory was that defendant did not have possession of the drugs or scale because Greer had brought them into defendant's apartment while she was at work that day. Defendant and Carothers testified that Greer had a key to the apartment, was frequently at the apartment during the day, and was well known to sell marijuana.

[1] Defendant first argues that the trial court erred by improperly expressing an opinion that tended to discredit defendant's defense theory. We agree.

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Near the beginning of defendant's testimony, she was questioned about Greer and how frequently he went over to her apartment. The relevant portion of the transcript reads:

Q: During that time, was [Greer] working?

A: Yes.

Q: And how often would you say that was?

A: Not that often because he knew that he could not be there, so he didn't stay there that much.

THE STATE: Objection. Your Honor. Where he was or was not has nothing to do with this charge.

THE COURT: Sustained. Let's move on to something else.

Q: Are you aware though of him staying . . .

THE COURT: Let's move on to another area. He has no involvement with these charges.

Defendant contends that the trial court's comment that Greer had "no involvement with these charges" tended to discredit the defense's theory to the jury by demonstrating that the trial judge did not believe that Greer was involved with the marijuana and scale, and, thus, that the contraband could not have been possessed by anyone but defendant.

A "judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2007). The rationale behind this rule is that "[i]t is generally recognized that a trial judge wields a strong influence over the trial jury. The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him." *State v. McEachern*, 283 N.C. 57, 61, 194 S.E.2d 787, 790 (1973) (quotations and citations omitted).

"In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732 (1999) (quotations and citations omitted). Although "[t]he trial court has a duty to control the examination of witnesses," the trial court cannot, while carrying out this duty, "express any opinion as to the weight to be given to or credibility of any competent evidence presented before

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the jury.” *Id.* at 126, 512 S.E.2d at 732-33 (quotations and citations omitted). “Whether the judge’s language amounts to an expression of opinion is determined by its probable meaning to the jury, not by the judge’s motive. Ordinarily, such expression of opinion cannot be cured by instructing the jury to disregard it.” *McEachern*, 283 N.C. at 60-60, 194 S.E.2d at 789.

In *State v. Oakley*, a couple whose house had been burglarized testified that they had pointed a law enforcement officer towards tracks in fresh snow leading away from their home. 210 N.C. 206, 208, 186 S.E.2d 244, 145 (1936). During the trial, the presiding judge told the officer that he could not testify at that point as to who made the tracks. However, the trial judge soon asked the officer, “You tracked the defendant to whose house?” *Id.* The trial judge immediately followed his question by clarifying, “I didn’t mean to say the defendant.” *Id.* Nevertheless, our Supreme Court held that the question amounted to an opinion that the defendant had been the one who left the tracks in the snow. Despite the trial judge’s attempt to rectify his statement, once “the damage is once done, it cannot be repaired, because, as we know, the baneful impression on the minds of the jury remains there still One word of untimely rebuke of his witness may so cripple a party as to leave him utterly helpless before the jury.” *Id.* at 210, 186 S.E.2d at 246 (quotations and citations omitted).

In contrast, in *State v. Cureton*, the Supreme Court held that a potentially damaging statement by a trial judge was not an opinion because of the circumstances in which it was made. 215 N.C. 778, 780-81, 3 S.E.2d 343, 345 (1939), *overruled on other grounds by State v. Williams*, 279 N.C. 663, 185 S.E.2d 174 (1971). In *Cureton*, a witness first testified that the defendant had shot the victim four times, but then later testified that the defendant shot the deceased an additional time. *Cureton*, 215 N.C. at 780, 3 S.E.2d at 345. At that point, the trial judge asked the witness, “When did he (defendant) shoot him (deceased) the last time[?]” *Id.* (alterations in original). On appeal, our Supreme Court held that the trial judge was merely seeking a clarification of the witness’s statement, not stating his opinion. *Id.* As such, there was no error. *Id.*

In *McEachern*, before the prosecution’s witness offered any testimony that she had been raped, the trial judge asked her, “Let me ask you a question of clarification before you go further, you were in the car when you were raped?” 283 N.C. at 59, 194 S.E.2d at 789. Our Supreme Court held that the question “although clearly inadvertent, assumed that defendant had raped” the victim. *Id.* at 62, 194 S.E.2d at

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790. Accordingly, the defendant was entitled to a new trial. *Id.* at 69, 194 S.E.2d at 795. The court in *McEachern* distinguished *Oakley* from *Cureton* as follows:

In *Oakley* the court's question expressed an opinion that the tracks were made by defendant. This crucial proof had not been shown by other evidence. In *Cureton* the fact that defendant had shot the deceased was supported by ample evidence, and the judge's question only sought clarification as to when and where the shooting took place. The defendant did not deny that he shot the deceased and in fact later testified that he fired the fatal shots, but that he did so in self defense.

Id. at 61, 194 S.E.2d at 790.

We believe that the facts of the present case are more akin to *Oakley* and *McEachern* than *Cureton*. The trial judge's statement that Greer "has no involvement with these charges" did not clarify any witness's comment nor seek further testimony. It was also not a statement clearly supported by previously admitted testimony or evidence. A reasonable interpretation of the statement is that Greer was not involved in defendant's purported possession of the drugs and scale; this topic was of utmost importance to defendant's defense. Although the trial judge likely did not intend his statement to have such a meaning, we look only at the statement's probable effect on the jury, not the intent of the judge. Defendant based her entire defense on showing that Greer had brought the drugs into defendant's apartment while she was at work. Because Carothers had already corroborated defendant's testimony that Greer had easy access to the apartment and that he frequently sold marijuana, the trial judge's comments could have discredited Carothers's testimony as well as defendant's, effectively rendering the defense's theory invalid or unbelievable. In addition, the trial judge's statement occurred near the beginning of defendant's testimony and may have discredited the remainder of defendant's testimony in the eyes of the jury.

Here, the statement rose to the level of an impermissible opinion that Greer was not involved with the possession of the drugs or scales. Whether Greer was involved with the drugs and scales, and to what degree, were factual questions for the jury to decide. Although surely unintentional, the trial judge's statement suggested that he had already assessed the credibility of defendant's evidence and found it lacking.

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Although “not every improper remark will require a new trial, a new trial may be awarded if the remarks go to the heart of the case.” *State v. Sidbury*, 64 N.C. App. 177, 179, 306 S.E.2d 844, 845 (1983). Here, the improper remark went to the heart of the defense by impugning the credibility of defendant and Caruthers. Accordingly, the error was prejudicial and requires a new trial. *See McEachern* at 69, 194 S.E.2d at 795.

[2] As such, we need not address defendant’s other assignments of error with the exception of one that has a likelihood of recurring: Defendant argues that she was subjected to double punishment when she was convicted of both felony possession of marijuana and felony possession with intent to sell or deliver marijuana. “Multiple punishment is one facet of the prohibition against double jeopardy.” *State v. McGill*, 296 N.C. 564, 568, 251 S.E.2d 616, 619 (1979). However, our Supreme Court has held that convictions for possession of a controlled substance and possession of a controlled substance with intent to sell or deliver do not violate a defendant’s rights. *State v. Pipkins*, 337 N.C. 431, 434, 446 S.E.2d 360, 363 (1994). In *Pipkins*, the defendant argued that he was subjected to double punishment when he was convicted of felony possession of cocaine and trafficking in cocaine by possession. *Id.* at 432, 446 S.E.2d at 361. The Court noted that the statute prohibiting possession of controlled substances “combats the perceived evil of individual possession of controlled substances,” but that the statute prohibiting trafficking by possession “is intended to prevent the large-scale distribution of controlled substances to the public.” *Id.* at 434, 446 S.E.2d at 363. As such, our Supreme Court concluded that “the legislature’s intent was to proscribe and punish separately the offenses of felonious possession of cocaine and of trafficking in cocaine by possession.” *Id.*

Although *Pipkins* involved drug trafficking by possession, rather than possession with intent to sell or deliver as in the case *sub judice*, *Pipkins* explicitly overruled *State v. Williams*, 98 N.C. App. 405, 390 S.E.2d 729 (1990), and *State v. Oliver*, 73 N.C. App. 118, 325 S.E.2d 682 (1985). 337 N.C. at 435, 446 S.E.2d at 363. In both *Williams* and *Oliver*, this Court had held that a defendant sentenced for felonious possession of cocaine and for possession with intent to sell or deliver the same cocaine was subjected to double punishment and, thus, the lesser charge must be arrested. *Williams*, 98 N.C. App. at 407, 390 S.E.2d at 730; *Oliver*, 73 N.C. App. at 122, 325 S.E.2d at 686. The defendants in *Williams* and *Oliver* were both charged with the same crimes as defendant in the present case: felonious possession of a

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controlled substance and felonious possession of a controlled substance with intent to sell or deliver. By explicitly overruling *Williams* and *Oliver*, the Supreme Court clarified that a defendant is not subjected to double punishment if she is sentenced and convicted of both possession of a controlled substance and possession of a controlled substance with intent to sell or deliver the same contraband. Therefore, defendant's right to be free from double punishment will not be impaired if, upon her new trial, she is convicted of felonious possession of marijuana and felonious possession of marijuana with intent to sell or deliver on retrial.

Vacated and remanded for new trial.

Judges BRYANT and CALABRIA concur.

LEONHARD BERNOLD, PETITIONER v. BOARD OF GOVERNORS OF THE
UNIVERSITY OF NORTH CAROLINA, RESPONDENT

No. COA09-165

(Filed 6 October 2009)

**1. Schools and Education— discharge of tenured professor—
professional incompetence—unsatisfactory post-tenure re-
views—collegiality**

The superior court did not err by upholding the discharge of a tenured professor for lack of collegiality. Petitioner was aware that collegiality was a professional expectation for his position, it was a possible focus of evaluation during his post-tenure reviews, and he received unsatisfactory post-tenure reviews in three consecutive years.

**2. Schools and Education— discharge of tenured professor—
due process—post-tenure review process**

The superior court did not err by failing to find that respondent Board of Governors violated a tenured professor's due process rights in its use of the post-tenure review process to discharge him because, after petitioner's three negative post-tenure reviews, respondent followed the process set forth in Section 603 of the Code of the Board of Governors of the University of North Carolina.

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3. Schools and Education— discharge of tenured professor— professional incompetence—disruptive behavior—whole record test

The superior court did not err by holding that substantial evidence in the record supported petitioner tenured professor's discharge based on incompetence because the record contained ample evidence that petitioner was disruptive to the point that his department's function and operation were impaired.

Appeal by petitioner from judgment and order entered 11 July 2008 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 14 September 2009.

Patterson Harkavy, L.L.P., by Ann Groninger, for petitioner.

Attorney General Roy Cooper, by Special Deputy Attorney General Valerie L. Bateman, for respondent.

BRYANT, Judge.

This matter concerns judicial review of the decision to discharge a tenured professor in the College of Engineering at North Carolina State University. After petitioner Leonhard Bernold received post-tenure review findings of “does not meet expectations” during 2002, 2003, and 2004, he was discharged on the bases of incompetent teaching and incompetent service. Petitioner requested a hearing before the faculty hearing committee (“the committee”) which was held during May, June, August and September 2005. The Committee unanimously found petitioner was not an incompetent teacher, but voted 3 to 2 that he had given incompetent service. The committee did not make a recommendation as to petitioner's discharge. The University's chancellor upheld the committee's finding on petitioner's teaching and remanded the matter to petitioner's department in the College of Engineering for a recommendation on discharging petitioner based solely on incompetent service. Subsequently, in June 2006, the committee held additional hearings on the issue of petitioner's service and this time, voted 4 to 1 that petitioner was not incompetent in the area of service. The chancellor reversed the committee's new decision on service and the University's Board of Trustees (“the Trustees”) affirmed the chancellor. On 30 May 2007, the University of North Carolina's Board of Governors (“the Board”) affirmed the Trustees' decision. Petitioner then sought judicial review in the Wake County Superior Court pursuant to N.C. Gen. Stat. § 150B-51. On 8

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July 2008, following a hearing, the superior court affirmed the Board's decision to uphold petitioner's discharge. Petitioner appeals.

Facts

Since 1996, petitioner has been a tenured professor in the Department of Civil, Construction and Environmental Engineering ("the department") at North Carolina State University. In 2002, the University adopted post-tenure review regulations. Regulation 05.20.04 provides that unsatisfactory reviews in two consecutive years or any three out of five years "will constitute evidence of the professional incompetence of the individual and may justify the imposition of serious sanctions up to or including discharge for cause." Petitioner received unsatisfactory post-tenure reviews in 2002, 2003 and 2004 which specified that his service did not meet expectations. Petitioner's discharge resulted.

Petitioner entered seven assignments of error which he brings forward in three arguments on appeal: the superior court (I) committed reversible error in upholding his discharge on grounds of lack of collegiality (a substantive due process claim); (II) committed reversible error in failing to find that petitioner's discharge violated his right to procedural due process; and (III) erred in holding that the record contained substantial evidence to support his discharge for incompetence. For the reasons discussed below, we affirm.

Standard of Review

"When a superior court exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court." *Early v. County of Durham, Dep't of Soc. Servs.*, — N.C. App. —, —, 667 S.E.2d 512, 519 (2008) (citations omitted), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 237 (2009). The standard of review of an administrative decision by the superior court is governed by N.C.G.S. § 150B-51(b):

[I]n reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;

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- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

N.C.G.S. § 150B-51(b) (2009).

Contentions by a petitioner of errors of law in the agency decision are reviewed *de novo* in the trial court. *Shackleford-Moten v. Lenoir County Dep't of Soc. Servs.*, 155 N.C. App. 568, 571, 573 S.E.2d 767, 769 (2002). "If the petitioner questions whether the agency's decision was supported by the evidence, was arbitrary and capricious or was the result of an abuse of discretion, the reviewing court must apply the 'whole record' test." *Id.* Under the 'whole record' test, the trial court must examine all competent evidence to determine whether the agency decision is supported by substantial evidence. *Id.* at 571, 573 S.E.2d at 770. Here, petitioner alleged both errors of law, that his substantive and procedural due process rights were violated, and a factual error, that no substantial evidence supported his discharge.

This Court's task when reviewing a superior court's order reviewing an administrative decision is simply to "consider those grounds for reversal or modification raised by the petitioner before the superior court and properly assigned as error and argued on appeal to this Court." *Id.* at 572, 573 S.E.2d at 770.

I

[1] Petitioner first argues that the superior court erred in upholding his discharge on grounds of lack of collegiality because tenured professors have a substantive due process right to protection from discharge except for incompetence, misconduct or neglect of duty. Having considered this issue *de novo*, we disagree.

Due process requirements for tenured faculty facing discharge are governed by Section 603 of the Code of the Board of Governors of the University of North Carolina ("the Code"). Petitioner is correct that Section 603(1) provides for discharge of tenured faculty only on

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the basis of “incompetence, neglect of duty, or misconduct of such a nature as to indicate that the individual is unfit to continue as a member of the faculty.” However, The University’s post-tenure review regulation 05.20.04 specifies that unsatisfactory reviews in two consecutive years or any three out of five years “will constitute evidence of the professional *incompetence* of the individual and *may justify the imposition of serious sanctions up to or including discharge for cause.*” (Emphasis added).

Here, respondent based its discharge of petitioner on “incompetence of service” which rendered him unfit to continue as a member of the faculty, specifically alleging that petitioner’s interactions with colleagues had been so disruptive that the effective and efficient operation of his department was impaired. College of Engineering Regulation 05.67.04 states that “each faculty member is expected to work in a collegial manner.” Thus, petitioner was aware that collegiality was a professional expectation for his position and that his collegiality or lack thereof was one possible focus of evaluation during his post-tenure reviews. Petitioner received unsatisfactory post-tenure reviews in three consecutive years, which constitutes sufficient evidence of his professional incompetence to justify his discharge for cause under post-tenure review regulation 05.20.04 and Section 603. Petitioner’s argument is overruled.

II

[2] Petitioner next argues that the superior court committed reversible error in failing to find that respondent violated his due process rights in its use of the post-tenure review process to discharge him. We disagree.

Specifically, petitioner contends respondent failed to provide him “a clear plan and timetable” for addressing his deficiencies, thus violating his procedural due process. As previously discussed, Section 603 specifies the due process protections to which a tenured faculty member is entitled and contains a detailed schedule of steps involving notice and hearings which the university must take prior to discharging a tenured faculty member. Section 603 does not contain any requirement for the tenured faculty member to be provided with “a clear plan and timetable.”

Instead, this language comes from the University of North Carolina Policy Manual, Policy 400.3.3(1)(a)(2), which states that one purpose of the post-tenure review process is to “provid[e] for a clear

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plan and timetable for improvement of performance of faculty found deficient.” Policy 400.3.3(1)(g) further recommends that a faculty member who receives a less than satisfactory review be provided with a plan which “include[s] specific steps designed to lead to improvement, a specified time line in which improvement is expected to occur, and a clear statement of consequences should improvement not occur within the designated time line.” However, these policies are not statements of due process requirements like Section 603 of the Code, but only a list of principles to guide the post-tenure review process.

Following petitioner’s three negative post-tenure reviews, respondent followed the process set forth in Section 603 and petitioner does not argue otherwise. The superior court did not err in upholding the Board’s decision and concluding that petitioner was not denied due process during his post-tenure review process.

III

[3] In his final argument, petitioner contends the superior court erred in holding that substantial evidence in the record supported his discharge for incompetence. We disagree.

Under the whole record test, the superior court was tasked with determining whether there was substantial evidence in the record to support the Board’s decision. “The ‘whole record’ test does not allow the reviewing court to replace the Board’s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.” *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted).

The superior court held that the record contained substantial evidence that petitioner’s behavior constituted incompetence that rendered him unfit to continue as a faculty member and we agree. Petitioner relies on his argument that “lack of collegiality” cannot constitute incompetence; however, he cites no authority that disruptive behavior cannot constitute incompetence. Petitioner then draws our attention to evidence in the record showing petitioner’s positive interactions with some colleagues and explaining the reasons behind his negative interactions with others. Our task is not to comb the record for evidence that would support a different outcome from that reached by the Board, but rather to look for substantial evidence to support the decision. *Id.* Here, the record contains ample evidence that petitioner was disruptive to the point that his department’s

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function and operation were impaired. Petitioner's argument is without merit.

AFFIRMED.

Chief Judge MARTIN and Judge HUNTER, Robert C., concur.

NATIONAL UTILITY REVIEW, LLC, PLAINTIFF v. CARE CENTERS, INC., DEFENDANT

No. COA08-1554

(Filed 6 October 2009)

**Jurisdiction— personal—Illinois corporation—doing business
in North Carolina—findings**

The trial court's findings of fact adequately supported its conclusion that defendant was subject to personal jurisdiction in North Carolina where defendant was an Illinois corporation that entered into a contract with plaintiff, a North Carolina corporation, to be performed in North Carolina. Defendant's contacts with North Carolina were not numerous, but the controversy arose from those contacts, and defendant purposefully availed itself of the benefits of doing business in North Carolina and reasonably could have expected that it would be brought into North Carolina courts.

Appeal by defendant from an order entered 18 September 2008 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 19 August 2009.

Tuggle Duggins & Meschan, P.A., by David F. Meschan, Robert C. Cone and David L. Bury, Jr., for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr., Jennifer K. Van Zant and Benjamin R. Norman, for defendant-appellant.

JACKSON, Judge.

Care Centers, Inc. ("defendant") appeals the 13 September 2008 order denying its motion to dismiss for lack of personal jurisdiction. For the following reasons, we affirm.

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National Utility Review, LLC (“plaintiff”) is a limited liability company with its main office and principal place of business in Guilford County, North Carolina. Plaintiff’s business consists of contracting with other companies, reviewing their utility and telephone usage and bills, and recommending changes to increase efficiency and lower costs. Plaintiff charges a percentage of the money saved as its fee. Defendant is an Illinois corporation with its main office and principal place of business in Illinois. Defendant provides financial management services to nursing homes in Illinois, Indiana, and Ohio. Eric Rothner (“Rothner”) is defendant’s founder. Hunter Management (“Hunter”) “owned and operated [] defendant (and/or) CCS Employee Benefits Group, Inc., a company which provided employee benefit services to [] defendant and nursing homes)[.]”

On or about April 2006, Kimmi Rudolph (“Rudolph”), Hunter’s employee and Rothner’s stepdaughter, and Christopher Leng (“Leng”), a member and manager of plaintiff, began speaking about plaintiff’s business. On or about May 2006, plaintiff sent proposals and contract agreements to Rudolph to send to defendant in Illinois. The agreements were accepted by plaintiff and signed in Illinois. The record is unclear as to whether the original contracts offered by plaintiff were accepted, whether new contracts were solicited by defendant, or whether defendant made a counter-offer.

Plaintiff performed its services—reviewing defendant’s phone and utility records and making recommendations for decreasing operating costs—from its location in North Carolina. Defendants were aware of plaintiff’s location and facilitated its work by sending the necessary invoices to plaintiff from Illinois. Defendant paid plaintiff a total of \$882.08. On 30 October 2007, plaintiff filed a complaint against defendant in the Superior Court of Guilford County, North Carolina. Plaintiff alleged breach of contract and unfair and deceptive trade practices. Plaintiff also claimed that defendant had not reported its cost savings to plaintiff as required by contract and requested an accounting of defendant’s utility service cost savings.

On 4 February 2008, defendant filed its answer, which included a motion to dismiss for lack of personal jurisdiction. On 21 February 2008, the trial court ordered both parties to continue with discovery and move the case toward trial. On 12 August 2008, defendant filed a motion to dismiss for lack of personal jurisdiction. The trial court heard argument on the issue on 3 September 2008 and entered an order denying the motion to dismiss on 18 September 2008. Defendant appeals the denial of the motion to dismiss.

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Neither party contests the findings of fact of the trial court in its 18 September 2008 order. “ ‘When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.’ ” *Eaker v. Gower*, 189 N.C. App. 770, 773, 659 S.E.2d 29, 32 (2008) (quoting *Banc of Am. Secs. LLC v. Evergreen Int’l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005)); see also *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 188 N.C. App. 302, 304, 655 S.E.2d 446, 448 (2008) (citing *Robbins v. Ingham*, 179 N.C. App. 764, 768, 635 S.E.2d 610, 614 (2006)). “Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.” *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962); *Williams v. Williams*, 97 N.C. App. 118, 121, 387 S.E.2d 217, 219 (1990)). Our review, therefore, is limited to “the issue of whether the trial court’s findings of fact support its conclusion of law” that the court has personal jurisdiction over defendant. *Cooper*, 188 N.C. App. at 304, 655 S.E.2d at 448. We conduct our review of this issue *de novo*. *Deer Corp. v. Carter*, 177 N.C. App. 314, 326, 629 S.E.2d 159, 168 (2006).

The analysis used to determine the existence of personal jurisdiction in North Carolina is well-established.

First, jurisdiction over the action must be authorized by N.C.G.S. § 1-75.4, our state’s long-arm statute. Second, if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Skinner v. Preferred Credit, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006) (citing *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 675, 231 S.E.2d 629, 630 (1977)). Both parties stipulate that the North Carolina long-arm statute applies and do not argue that issue on appeal. Therefore, our analysis is limited to whether “the exercise of this jurisdiction over [] defendant comport[s] with constitutional standards of due process[.]” *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 283, 350 S.E.2d 111, 113 (1986).

Due process requires “certain minimum contacts [between the nonresident defendant and the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316,

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90 L. Ed. 95, 102 (1945). In addition, a defendant must “purposefully avail[] himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986); *see also Deer Corp.*, 177 N.C. App. at 326, 629 S.E.2d at 168. Sufficient minimum contacts may be based upon either specific jurisdiction or general jurisdiction. *See Banc of Am.*, 169 N.C. App. at 696, 611 S.E.2d at 184. “Specific jurisdiction exists when ‘the controversy arises out of the defendant’s contacts with the forum state.’ ” *Id.*

The existence of sufficient minimum contacts to permit personal jurisdiction is determined “by a careful scrutiny of the particular facts of each case.” *Cameron-Brown*, 83 N.C. App. at 284, 350 S.E.2d at 114.

In determining whether sufficient minimum contacts exist, the Court should consider (1) the quantity of contacts between defendants and North Carolina; (2) the nature and quality of such contacts; (3) the source and connection of plaintiff’s cause of action to any such contacts; (4) the interest of North Carolina in having this case tried here; and (5) convenience to the parties.

First Union Nat’l Bank of Del. v. Bankers Wholesale Mortgage, LLC, 153 N.C. App. 248, 253, 570 S.E.2d 217, 221 (2002). “No single factor controls; rather, all factors ‘must be weighed in light of fundamental fairness and the circumstances of the case.’ ” *Corbin Russwin, Inc. v. Alexander’s Hardware, Inc.*, 147 N.C. App. 722, 725, 556 S.E.2d 592, 595 (2001) (quoting *B.F. Goodrich Co. v. Tire King*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986)). Beyond the “minimum contacts” determination,

the Court should take into account (1) whether defendants purposefully availed themselves of the privilege of conducting activities in North Carolina, (2) whether defendants could reasonably anticipate being brought into court in North Carolina, and (3) the existence of any choice-of-law provision contained in the parties’ agreement.

Id. (citations omitted). The “relationship between the defendant and the forum must be ‘such that he should reasonably anticipate being haled into court there.’ ” *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980)).

NAT'L UTIL. REVIEW, LLC v. CARE CTRS., INC.

[200 N.C. App. 301 (2009)]

The trial court found that sufficient contacts existed between defendant and North Carolina to satisfy the requirements of due process. This conclusion of law was based upon a number of uncontested findings of fact, including: (1) plaintiff, with whom defendant entered into a contract, is a North Carolina company, (2) defendant knew the work done by plaintiff would be performed in North Carolina, (3) such work was, in fact, done by plaintiff in North Carolina, (4) defendant facilitated the performance of this work by forwarding invoices to plaintiff in North Carolina, (5) all payments made to plaintiff were mailed to it in North Carolina, and (6) “[n]o substantial disparity exists between [] plaintiff and [] defendant as to the ability to conduct litigation in a remote forum, and the inconvenience to do so is not substantially greater for the defendant than for the plaintiff.” The trial court addressed many of the factors involved in a minimum contacts determination with these findings of fact. Similar to the trial court, we recognize that defendant’s contacts “are not great in quantity[;]” nonetheless, because they “are at the core of the parties’ relationship[,] . . . their quality is substantial.” Because “the controversy [arose] out of the defendant’s contacts with the forum state[;]” *Banc of Am.*, 169 N.C. App. at 696, 611 S.E.2d at 184, these contacts establish specific jurisdiction. We, therefore, hold that the trial court’s findings of fact sufficiently support its conclusion of law that the defendant had minimum contacts with North Carolina.

Defendant also must have purposefully availed itself of the benefits of doing business in North Carolina in order to satisfy due process. Defendant argues that the fact that it knew the work under the contract was to be performed in North Carolina “does not matter.” We disagree.

It is the clear, consistent rule that knowledge of the location of the work is relevant and does matter for a purposeful availment analysis. *See, e.g., Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 787 (defendant’s awareness “that the contract was going to be substantially performed in this State” was relevant to whether defendant purposefully availed itself of state’s benefits). Defendant’s knowledge that plaintiff is located in North Carolina and that the services expected from plaintiff were to be performed in North Carolina enabled it to “reasonably anticipate being brought into court in North Carolina.” *First Union*, 153 N.C. App. at 253, 570 S.E.2d at 221. Therefore, defendant purposefully availed itself of the benefits of doing business in North Carolina and reasonably could have expected that it would be brought into this state’s courts.

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[200 N.C. App. 306 (2009)]

Although some facts that could have informed a minimum contacts analysis remain unclear from the record, those facts were not essential to the trial court's conclusions of law. We hold that the trial court's findings of fact adequately support its conclusion of law that defendant is subject to personal jurisdiction in North Carolina with respect to its contract with plaintiff.

For the reasons stated above, we hold that the trial court's findings of fact adequately support its conclusion of law that defendant is subject to personal jurisdiction in North Carolina in this matter.

Affirmed.

Judges McGEE and ERVIN concur.

BRENDA LIVESAY, TRUSTEE OF THE RONALD LIVESAY AND BRENDA LIVESAY FAMILY TRUST DATED MARCH 26, 1998, BRENDA LIVESAY, GUARDIAN AD LITEM FOR CANDICE LIVESAY AND RON LIVESAY, JR., AND BRENDA LIVESAY, INDIVIDUALLY, PLAINTIFFS v. CAROLINA FIRST BANK, SAFECO CORPORATION, FIRST NATIONAL INSURANCE COMPANY OF AMERICA, AND E.K. MORLEY, ADMINISTRATOR CTA OF THE ESTATE OF RONALD B. LIVESAY, DECEASED, DEFENDANTS

No. COA09-111

(Filed 6 October 2009)

1. Jurisdiction— subject matter—claim involving estate and trust—to be handled by clerk

The trial court did not err by granting a motion to dismiss for lack of subject matter jurisdiction a declaratory judgment action involving creditors' claims against an estate and assertions involving a family trust. The issues were part of the administration of the estate to be handled by the clerk.

2. Appeal and Error— standing—not assigned as error—issue dismissed

An issue involving standing that was not assigned as error was dismissed.

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[200 N.C. App. 306 (2009)]

3. Appeal and Error—cross—assignment of error—two bases for upholding order—one affirmed—the other not addressed

A cross-assignment of error concerning jurisdiction in an estate and trust matter was not addressed where the trial court's order did not specify the grounds for dismissing for lack of subject matter jurisdiction, either of the grounds argued was sufficient alone to support the order, and one of the grounds was affirmed elsewhere.

Appeal by plaintiff from an order entered 9 October 2008 by Judge Mark E. Powell in the Henderson County Superior Court. Heard in the Court of Appeals 20 August 2009.

Gary A. Dodd and Charles Brewer for plaintiff.

Russell McLean III for plaintiff as Guardian Ad Litem for Candace Livesay and Ron Livesay, Jr.

Smith Moore Leatherwood, L.L.P., by James G. Exum, Jr., Allison O. Van Laningham, and L. Cooper Harrell, for defendant E.K. Morley.

BRYANT, Judge.

On 7 August 2008, plaintiff Brenda Livesay, acting individually and in her capacity as trustee and guardian ad litem, filed a declaratory judgment action against Carolina First Bank, Safeco Corporation, First National Insurance Company of America and E.K. Morley, administrator CTA of the Estate of Ronald B. Livesay, deceased. On 21 August 2008, Morley moved to dismiss under Rule 12(b), arguing that plaintiff lacked standing and that the superior court lacked subject matter jurisdiction. On 9 October 2008, the trial court granted the motion, stating that it “lack[ed] jurisdiction of the subject matter.” Plaintiff appeals. For the reasons discussed below, we affirm.

Facts

Plaintiff's husband, Ronald B. Livesay, died 1 July 2005 and on 30 December of that year, plaintiff filed a declaratory judgment action in the Henderson County Superior Court against Carolina First Bank, Safeco Corporation, and First National Insurance Company of America (“the other defendants”). Plaintiff asked the trial court to construe the terms of the Livesay Family Trust, interpret various relevant state statutes, and determine whether the trust was revocable

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and therefore reachable by creditors of Mr. Livesay's estate. Morley was thereafter appointed administrator CTA of the estate and, in July 2006, he intervened as a defendant in the 2005 action. On 6 June 2007, Morley and the other defendants moved for partial summary judgment. The trial court granted the motion, and plaintiff appealed. This Court unanimously affirmed, holding that the trust was reachable by the estate's creditors to the extent necessary to satisfy the estate's debts. *Livesay v. Carolina First Bank*, — N.C. App. —, 665 S.E.2d 158 (2008) ("*Livesay I*"). Plaintiff's petition for discretionary review of that decision is pending in the North Carolina Supreme Court.

On 26 February 2008, prior to our decision in *Livesay I*, Morley, as Administrator CTA of the estate, moved for a preliminary injunction in the Henderson County Superior Court to restrain plaintiff from making any expenditures or withdrawals from the Livesay Family Trust until all issues related to the administration of the estate were resolved. After the trial court denied the motion for preliminary injunction, the other defendants appealed and we affirmed. *Livesay v. Carolina First Bank*, — N.C. App. —, 673 S.E.2d 883 (2009) (unpublished).

During the appeal of the 2005 action, Morley continued to administer the estate, and on 19 June 2008, he filed a motion with the clerk of court for confirmation of creditors' claims and for judicial determination of inadequacy of the estate's assets. In response, plaintiff filed the declaratory judgment action from which the current appeal arises.

Analysis

[1] Plaintiff's sole assignment of error is that the trial court erred in granting Morley's motion to dismiss because the trial court had subject matter jurisdiction pursuant to Rule 57 and the Uniform Declaratory Judgment Act. We disagree.

The standard of review for an order granting a motion to dismiss for lack of subject matter jurisdiction is *de novo*. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

The General Assembly has specified that

[t]he clerk of superior court of each county, ex officio judge of probate, shall have jurisdiction of the administration, settlement, and distribution of estates of decedents including, but not limited to, the following:

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- (1) Probate of wills;
- (2) Granting of letters testamentary and of administration, or other proper letters of authority for the administration of estates.

N.C. Gen. Stat. § 28A-2-1 (2009). It is well-settled that the clerk of court is “given exclusive original jurisdiction in the administration of decedents’ estates except in cases where the clerk is disqualified to act.” *In re Estate of Longest*, 74 N.C. App. 386, 390, 328 S.E.2d 804, 807 (citing *In re Estate of Adamee*, 291 N.C. 386, 398, 230 S.E.2d 541, 549 (1976)), *cert. denied and appeal dismissed*, 314 N.C. 330, 333 S.E.2d 488 (1985). Thus, Morley contends that the trial court correctly dismissed plaintiff’s declaratory judgment action since it concerned the administration, settlement, and distribution of an estate and was thus in the exclusive original jurisdiction of the clerk.

In contrast, plaintiff argues that her declaratory judgment action in the superior court is authorized by N.C. Gen. Stat. § 1-255, which provides

[a]ny person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

- (1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or
- (2) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or
- (3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.
- (4) To determine the apportionment of the federal estate tax, interest and penalties under the provisions of Article 27 of Chapter 28A.

N.C.G.S. §1-255 (2009). While the language of these statutes appears somewhat contradictory, our case law reveals a clear division between estate-related issues which are properly brought in the superior court and those which are part of the standard adminis-

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tration of an estate and therefore outside the superior court's subject matter jurisdiction.

In *In re Jacobs*, the defendant contested transfer of his case to the civil docket because the clerk of court has exclusive and original jurisdiction of all probate matters. 91 N.C. App. 138,141, 370 S.E.2d 860, 863, *disc. review denied*, 323 N.C. 476, 373 S.E.2d 863 (1988). We noted that

our courts distinguish cases which 'arise from' the administration of an estate from those which are 'a part of' the administration and settlement of an estate. Those cases which are 'a part of' the administration of an estate are considered probate matters in which the clerk of superior court has exclusive original jurisdiction.

Id. at 141-142, 370 S.E.2d at 863 (citation omitted); *see also Ingle v. Allen*, 69 N.C. App. 192, 196, 317 S.E.2d 1, 3, *disc. review denied*, 311 N.C. 757, 321 S.E.2d 135 (1984). For example, "claims of misrepresentation, undue influence and inadequate disclosure of assets or liabilities" arise from, but are not part of, the administration of an estate and are properly determined by the superior court. *In re Estate of Wright*, 114 N.C. App. 659, 661, 442 S.E.2d 540, 542, *cert. denied*, 338 N.C. 516, 453 S.E.2d 172 (1994). Claims for breach of fiduciary duty, negligence and fraud are also for the superior court. *Ingle v. Allen*, 53 N.C. App. 627, 628-29, 281 S.E.2d 406, 407 (1981). However, claims seeking an accounting and distribution from an estate, appointment of a new trustee, and return of compensation received from an estate "are a part of the administration, settlement and distribution of estates of decedents, original jurisdiction over which should properly be initially exercised by the clerk." *Id.* at 629, 281 S.E.2d at 408 (internal quotation marks, emphasis and citation omitted).

Here, plaintiff's action involves claims for offsets against certain creditors' claims against the estate and her assertions that various claims by creditors are collectable from the Livesay Family Trust. She also seeks protection of her contributions to the Livesay Family Trust and contends that the estate's assets should be marshaled by Morley so that he can provide an accounting. We conclude these issues are "a part of" the administration of the estate and are thus properly handled by the clerk.¹

1. Plaintiff's action sought declarations on nine specific matters: 1) that a November 2002 promissory note was not collectable by Carolina First; 2) that the outstanding balance on the November 2002 promissory note was paid by plaintiff who was

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[2] Plaintiff's brief also asserts Morley lacked standing to bring a Rule 12(b) motion in the trial court. However, because this issue was not assigned as error by plaintiff, it is not properly before this Court and we dismiss plaintiff's argument. N.C. R. App. P. 10(a) (2009).

[3] Pursuant to Appellate Rule 10(d), Morley cross-assigns as error the trial court's failure to find, as part of its order allowing his motion to dismiss, that plaintiff's complaint should be dismissed for lack of standing. Morley moved to dismiss on the basis of both the clerk's exclusive original jurisdiction of the matter, as discussed above, and plaintiff's lack of standing. The trial court's order dismissed for lack of subject matter jurisdiction, but did not specify the underlying basis for so finding. Because either of the grounds argued by Morley before the trial court in his motion to dismiss is sufficient alone to support the trial court's order, and because we affirm the order based on the clerk's exclusive original jurisdiction, we need not address this cross-assignment of error.

AFFIRMED.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA v. SHAWN DUPREE CORPENING

No. COA09-48

(Filed 6 October 2009)

1. Search and Seizure— motion to suppress evidence of drugs—voluntary stop prior to checkpoint

The trial court did not err in a prosecution for possession with intent to manufacture, sell, and deliver a Schedule II controlled substance by denying defendant's motion to suppress evi-

thus entitled to a credit or offset; 3) that plaintiff's contributions to the trust during coverture and her individual assets contributed to the trust are free and clear of claims of the creditors of the estate; 4) that the clerk of superior court in Henderson County lacks jurisdiction to determine claims of Safeco and First National until the courts of Tennessee have determined alleged losses related to those claims; 5) that an asset/purchase agreement which Morley approved is not fair or reasonable and would be detrimental to the rights of the estate; 6) that certain promissory notes allegedly held by Carolina First are not legally enforceable debts collectable from the estate; 7) that claims of Carolina First related to various notes are time barred; 8) that certain claims by Safeco and First National are time barred; and 9) that the assets of the estate cannot be properly determined until Morley marshals them and provides an accounting.

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dence obtained as a result of an allegedly unconstitutional search and seizure. Defendant's argument that a checkpoint was unconstitutional was inapplicable since he stopped solely of his own volition rather than pursuant to any form of State action; the officer legitimately approached defendant's vehicle and detected the plain smell of marijuana, which provided sufficient probable cause to support a search and defendant's subsequent arrest.

2. Trials— orders—handwritten

Trial courts should prepare a typewritten, as opposed to handwritten, order, or alternatively, direct counsel to prepare a typewritten order on the trial court's behalf.

Appeal by defendant from judgments entered 9 January 2008 by Judge Laura J. Bridges in Buncombe County Superior Court. Heard in the Court of Appeals 19 August 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General David N. Kirkman, for the State.

Eric A. Bach, for defendant-appellant.

JACKSON, Judge.

Shawn Dupree Corpening ("defendant") appeals from judgment and commitment orders sentencing him to a term of 116 to 149 months imprisonment. For the reasons set forth below, we hold no error.

In November 2006, Officer Josh Biddix ("Officer Biddix") of the Asheville Police Department ("Police Department"), along with other officers from nearby municipalities as well as Buncombe County, worked a second job with the Asheville Housing Authority ("Housing Authority"). Officer Biddix's duties for the Housing Authority included responding to calls and performing general law enforcement activities on various Housing Authority properties. Officer Biddix and the other officers regularly conducted license and registration checkpoints at the entrances to Housing Authority properties pursuant to procedures established by the Police Department.

On 8 November 2006, Officer Biddix was assisting with a checkpoint at entrances to the Pisgah View apartments, a Housing Authority property. At approximately 8:35 p.m. on 8 November 2006, Officer Biddix and other officers operating the checkpoint observed a white Toyota Avalon, driven by defendant, approach the check-

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point, pull over, and park on the left side of the road, approximately 100 to 200 feet prior to reaching the checkpoint. Defendant parked in front of a house before entering the Housing Authority's property, and he sat alone in the car for approximately thirty to forty-five seconds. During this time, defendant did not do anything inside the car, defendant did not exit the car, and no one approached the car.

Officer Biddix "recognized this as strange" and approached defendant's vehicle, and, when he did, he smelled the odor of marijuana coming from the vehicle. Officer Biddix then instructed defendant to exit the vehicle and Officer Biddix conducted a pat-down search of defendant's person. Officer Biddix found approximately \$600.00 in cash on defendant's person. Officer Biddix then searched the center console of the vehicle and found several "baggies" with white residue on them. Sergeant Michael Dykes ("Sergeant Dykes") of the Woodfin Police Department also was assisting with the checkpoint that night, and he found a camouflage jacket in the front passenger seat of the vehicle. Inside the pocket of the jacket, Sergeant Dykes found a bag of what he believed to be crack cocaine.

Upon discovering that defendant's license had been revoked, defendant was cited for driving while his license was revoked and possession of drug paraphernalia. Defendant later was indicted for possession with intent to sell or deliver a Schedule II controlled substance. On 7 January 2008, defendant filed a motion to suppress which the trial court subsequently denied. On 9 January 2008, a jury found defendant guilty of possession with intent to manufacture, sell and deliver a Schedule II controlled substance and guilty of obtaining the status of an habitual felon. Upon the jury's verdict, the trial court entered a judgment and commitment sentencing defendant within the presumptive range for a prior record level III habitual felon to 116 to 149 months imprisonment for possession with intent to manufacture, sell and deliver a Schedule II controlled substance. Defendant appeals.

[1] On appeal, defendant contends that the trial court erred by denying his motion to suppress evidence obtained as a result of an unconstitutional search and seizure effected, in part, by an unconstitutional checkpoint. We disagree.

As a preliminary matter, we hold that defendant's argument that the checkpoint was unconstitutional is inapplicable in the case *sub judice*. In an uncontested finding of fact, the trial court found

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[t]hat at about 8:35 pm the officers noticed a white Toyota Avalon pull to the side of the curb about 100 [to] 200 feet from the check-point and stop. The driver, [defendant], did not exit the vehicle nor did anyone in any of the residences walk out to the vehicle.

“ ‘Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.’ ” *State v. Taylor*, 178 N.C. App. 395, 401, 632 S.E.2d 218, 223 (2006) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). Because defendant stopped solely of his own volition, rather than pursuant to any form of State action, and because defendant parked 100 to 200 feet prior to the checkpoint, we need not address (1) whether the checkpoint was valid, or (2) engage in an analysis concerning a “traffic stop.” See, e.g., *State v. Styles*, 362 N.C. 412, 665 S.E.2d 438 (2008); *State v. Hughes*, 353 N.C. 200, 539 S.E.2d 625 (2000); *State v. Miller*, 198 N.C. App. 196, 678 S.E.2d 802 (2009).

Accordingly, we inquire only whether the officers legitimately approached defendant’s vehicle, which was parked beside the curb on a public street, and whether the officers developed the probable cause necessary to effectuate a constitutionally permissible search and seizure of defendant’s person or property. See U.S. Const. amend. IV; N.C. Const. art. I, § 20; *State v. Rivens*, 198 N.C. App. 130, 134, 679 S.E.2d 145, 149 (2009) (citing *State v. Rigsbee*, 285 N.C. 708, 713, 208 S.E.2d 656, 660 (1974) and *State v. Yates*, 162 N.C. App. 118, 589 S.E.2d 902 (2004)).

As we previously have explained,

[i]t is well established that law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.

State v. Johnston, 115 N.C. App. 711, 714, 446 S.E.2d 135, 137-38 (1994) (quoting *Florida v. Royer*, 460 U.S. 491, 497-98, 75 L. Ed. 2d

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229, 236 (1983) (plurality opinion) (citations omitted)). Furthermore, “‘a seizure does not occur simply because a police officer approaches an individual and asks a few questions.’” *Id.* (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991)). “‘Communications between police and citizens involving no coercion or detention are outside the scope of the fourth amendment.’” *Id.* (quoting *State v. Thomas*, 81 N.C. App. 200, 205, 343 S.E.2d 588, 591, *disc. rev. denied*, 318 N.C. 287, 347 S.E.2d 469 (1986) (citation omitted)).

In the case *sub judice*, Officer Biddix approached defendant, who was sitting without any activity for approximately thirty to forty-five seconds in a vehicle parked on a public road. After lawfully approaching defendant’s vehicle, the officer smelled marijuana. *See id.*; *State v. Yates*, 162 N.C. App. 118, 121-23, 589 S.E.2d 902, 903-05 (2004) (explaining the “plain smell” exception to the Fourth Amendment by analogy to the well-established “plain view” exception and holding no error in the trial court’s denial of defendant’s motion to suppress in view of the exigent circumstances and plain smell exceptions). We hold that the officer legitimately approached defendant’s vehicle and detected the “plain smell” of marijuana as set forth in *Yates*. *See Johnston*, 115 N.C. App. at 714, 446 S.E.2d at 137-38; *Yates*, 162 N.C. App. at 122-23, 589 S.E.2d at 904-05. The “plain smell” of marijuana by the officer provided sufficient probable cause to support a search and defendant’s subsequent arrest. *See id.*

[2] As a side note, we would caution the trial court against the entry of handwritten orders. The order included in the record from which defendant appealed is a photocopy of a four-page handwritten order with additional handwriting along the margins. We ask that our attorneys subscribe to a certain degree of formality in practicing in the courts of this State, submitting typewritten documents, adhering to specific margins, etc. *See, e.g.*, N.C. R. App. P. 26(g), 28(b), 28(j) (setting forth type and margin requirements for briefs filed with this Court); Buncombe County Local Rules, Rule 11.12 (adopting brief requirements set forth in the North Carolina Rules of Appellate Procedure when Buncombe County Superior Court sits as an appellate court in an administrative appeal). As judges, we should expect no less of ourselves. Accordingly, we previously have explained that trial courts should prepare a typewritten order, or alternatively, direct counsel to prepare a typewritten order on their behalf. *See Heatzig v. MacLean*, — N.C. App. —, —, 664 S.E.2d 347, 354-55, *disc. rev. denied and appeal dismissed*, 362 N.C. 681, 670 S.E.2d 564 (2008)

IN RE FORECLOSURE OF BARBOT

[200 N.C. App. 316 (2009)]

(instructing that the trial court should have directed the revision of a typewritten order to counsel rather than entering an order with handwritten modifications).

For the foregoing reasons, we hold no error in the trial court's denial of defendant's motion to suppress evidence obtained pursuant to a constitutionally permissible search and seizure.

No error.

Judges McGEE and ERVIN concur.

IN THE MATTER OF THE FORECLOSURE OF A LIEN BY HUNTERS CREEK TOWNHOUSE HOMEOWNERS ASSOCIATION, INC., AGAINST JAMES C. BARBOT AND JANE O. BARBOT

No. COA09-118

(Filed 6 October 2009)

Mortgages and Deeds of Trust— necessary parties—foreclosure sale

The trial court's order setting aside a sale and vacating a foreclosure order is itself vacated and remanded for additional proceedings upon joinder of all necessary parties. The record owner of the property who purchased it at a judicial sale without notice of infirmity of title was a necessary party.

Appeal by third-party purchaser for value Ed Bartley from an order entered 10 October 2008 by Judge Paul G. Gessner in the Wake County Superior Court. Heard in the Court of Appeals 20 August 2009.

Maitin Law Firm, by Lawrence S. Maitin, for appellees.

Clifton & Singer, L.L.P., by Benjamin F. Clifton, Jr., for appellant.

BRYANT, Judge.

Appellant Ed Bartley, third party purchaser for value at foreclosure sale, appeals judgment of the trial court setting aside the sale and vacating a foreclosure order. For the reasons stated herein, we vacate the order and remand for additional proceedings.

IN RE FORECLOSURE OF BARBOT

[200 N.C. App. 316 (2009)]

Facts

This matter concerns the purported foreclosure sale of lot 60 of the Hunters Creek Townhouses (“the property”). On 25 July 2007, Hunters Creek Townhouse Homeowners Association, Inc., (“HCTHA”) filed a claim of lien against the property, alleging that appellees James C. and Jane O. Barbot, non-resident owners of the property at the time of the sale, were delinquent in their association dues. On 8 October 2007, HCTHA filed a notice of foreclosure hearing with the Clerk of Superior Court in Wake County. On 31 January 2008, the assistant clerk entered an order authorizing foreclosure, and on 30 May 2008, a final report and account of foreclosure sale was filed showing that the property had been sold to Bartley. HCTHA attempted to serve each relevant filing and document with the Barbots at the property’s address, 4206 Sterlingworth Court in Raleigh. The evidence tended to show that the Barbots never lived at the property and that their legal address was 3909 Saint James Church Road in Raleigh. On 19 May 2008, the Barbots filed a motion to set aside the foreclosure sale and to vacate the foreclosure order based on lack of notice because all the relevant legal documents and filings were mailed to the property rather than to their mailing address. Bartley responded by filing a memorandum of law and affidavit on 30 July 2008. On 10 October 2008, the trial court vacated the sale and set aside the foreclosure order. Bartley appeals.

On appeal, Bartley contends the trial court erred in setting aside the foreclosure sale and vacating the foreclosure order on two grounds: (I) the Barbots failed to offer any evidence to support their motion, and (II) Bartley was an innocent purchaser for value without notice of any alleged defects in service of the foreclosure notice to the property owners. In addition, the Barbots move to dismiss this appeal for lack of standing.

Analysis

We begin by addressing the question of Bartley’s standing in this matter. The Barbots have moved to dismiss this appeal on grounds that Bartley lacks standing to pursue same because he is not a party to this action. In response to the Barbots’ motion, and in his second assignment of error, Bartley contends that he is a necessary party who should have been joined by the Barbots in their action to set aside the foreclosure sale, and that because he was not, the trial court

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erred in failing to dismiss the motion to set aside. We agree that Bartley is a necessary party, and thus we vacate the trial court's order and deny the Barbots' motion to dismiss.

The record before this Court does not indicate that Bartley ever moved for joinder or was properly joined as a necessary party in the action to set aside the foreclosure sale. However, the record does reflect that he was 1) named in the Barbots' motion as the person to whom the property had been deeded, 2) served with the motion to dismiss, 3) noticed for the hearing on the motion, 3) allowed to obtain a continuance, the order for which refers to him as a "party in interest," 4) permitted to file an affidavit and a memorandum of law in the matter, and 5) charged with attorney fees and costs related to the continuance he obtained.

North Carolina Rule of Civil Procedure 19 governs the necessary joinder of parties and provides in pertinent part:

(a) Necessary joinder.—Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint; provided, however, in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts.

(b) Joinder of parties not united in interest.—The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

N.C. Gen. Stat. § 1A-1, Rule 19 (2009). "Necessary parties must be joined in an action." *Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E.2d 360, 365 (1978). "[T]he necessary joinder rules of N.C.G.S. Sec. 1A-1, Rule 19 place a mandatory duty on the court to protect its own jurisdiction to enter valid and binding judgments." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 16-17 362 S.E.2d 812, 822 (1987) (citations omitted). "When the absence of a necessary party is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action." *White v. Pate*, 308 N.C. 759, 764, 304 S.E.2d 199, 202-03 (1983). "When there is

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an absence of necessary parties, the trial court should correct the defect *ex mero motu* upon failure of a competent person to make a proper motion.” *Rice v. Randolph*, 96 N.C. App. 112, 113, 384 S.E.2d 295, 297 (1989) (citing *White*, 308 N.C. at 764, 304 S.E.2d at 203); *see also Booker*, 294 N.C. at 156, 240 S.E.2d at 366 (“When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in.”). “A judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void.” *Rice*, 96 N.C. App. at 113, 384 S.E.2d at 297 (citing *Ludwig v. Hart*, 40 N.C. App. 188, 190, 252 S.E.2d 270, 272, *disc. review denied*, 297 N.C. 454, 256 S.E.2d 807 (1979)). Thus, if Bartley is a necessary party to the resolution of the instant matter, the trial court erred in failing to join him and its order setting aside the foreclosure sale is null and void.

“A ‘necessary’ party is one whose presence is required for a complete determination of the claim, and is one whose interest is such that no decree can be rendered without affecting the party.” *Begley v. Employment Security Comm.*, 50 N.C. App. 432, 438, 274 S.E.2d 370, 375 (1981) (internal citation omitted); *see also Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 438-39, 527 S.E.2d 40, 44 (2000). Where the “relief sought by the plaintiff is to have [a] deed declared null and void[,] . . . the court would have to have jurisdiction over the parties necessary to convey good title [including the equitable owner].” *Brown v. Miller*, 63 N.C. App. 694, 699, 306 S.E.2d 502, 505 (1983), *disc. review denied*, 310 N.C. 476, 312 S.E.2d 882 (1984). In *Goodson v. Goodson*, the Goodsons, who had owned the property at issue and were moving to set aside a judicial sale, had neglected to join as necessary parties the Freemans, who had purchased the property at the judicial sale without any actual or constructive knowledge of infirmity of title, just as Bartley contends he did here. 145 N.C. App. 356, 364, 551 S.E.2d 200, 206 (2001). “In order to declare the deed to [the property] null and void, the trial court needed jurisdiction over all of the current owners of the property, which it did not have.” *Id.* (internal citation omitted). The same situation is presented in this case.

Bartley, record owner of the property who purchased it without notice of infirmity of title at a judicial sale, is a necessary party in the Barbots’ motion to set aside the foreclosure sale. When both the Barbots and Bartley failed to move to join Bartley as a necessary party, the trial court should have intervened *ex mero motu* to ensure his joinder. The trial court having failed to do so, its order setting aside the sale is null and void.

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We therefore vacate the order below and remand for further proceedings upon joinder of all necessary parties.

VACATED AND REMANDED.

Judges CALABRIA and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 OCTOBER 2009)

BASS v. BASS No. 08-1455	Brunswick (05CVD731)	Affirmed in Part, Reversed in Part and Remanded
DOBSON v. THE SALVATION ARMY No. 08-1425	Indus. Comm. (IC480604)	Affirmed
HILL v. THOMPSON No. 09-231	Wake (07CVS12105)	Affirmed in Part, Reversed in Part and Remanded
IN RE B.H. AND T.B. No. 09-597	Buncombe (08JA194) (08JA193)	Affirmed in part; re- versed and remanded in part
IN RE JMC No. 09-494	Wilkes (07JT64) (07JT65) (07JT63) (07JT66)	Reversed
SLIGHT v. SLIGHT No. 09-107	Nash (08CVD24)	Affirmed
STATE v. ARETZ No. 09-588	Onslow (06CRS57112)	Affirmed
STATE v. BLACK No. 09-351	Cleveland (07CRS54339) (07CRS54344) (07CRS54338)	No Error
STATE v. CUFFEE No. 09-133	Pasquotank (05CRS51492)	Remanded
STATE v. DICKERSON No. 09-211	Wayne (04CRS51209)	No Error
STATE v. DUREN No. 09-248	Forsyth (05CRS61339) (05CRS62006) (05CRS61995) (05CRS61999) (05CRS62004) (05CRS61990) (05CRS61087) (05CRS61996) (05CRS61247) (05CRS61089) (05CRS61991)	No Error

	(05CRS61028) (05CRS62009)	
STATE v. GREEN No. 09-96	New Hanover (07CRS9938) (07CRS55957) (07CRS9937)	No Error
STATE v. KEREKES No. 09-70	Guilford (07CRS95681) (07CRS95682) (07CRS95680) (07CRS95683)	Affirmed
STATE v. MUELLER No. 09-219	Hoke (03CRS2313) (03CRS2318) (03CRS2315) (03CRS2319) (03CRS2312) (03CRS2316)	Vacated and remanded
STATE v. PERTILLER No. 09-88	Buncombe (07CRS60414) (07CRS553) (07CRS60413)	Dismissed
STATE v. QUICK No. 08-1023	Guilford (07CRS78390) (07CRS78389)	Affirmed
STATE v. RAYNOR No. 08-1490	Brunswick (06CRS51136) (06CRS51121) (06CRS51126) (06CRS51137) (06CRS51122) (06CRS51127) (06CRS51120) (06CRS51125)	No Error
STATE v. ROACH No. 08-720	Guilford (05CRS101759) (05CRS101758)	Affirmed
STATE v. SIMMONS No. 08-1560	Brunswick (06CRS53530)	No Error
STATE v. WILLIAMS No. 09-184	Stanly (08CRS1263)	Affirmed
THOMPSON v. THOMPSON No. 09-162	Robeson (08CVD2881)	Affirmed

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LIBERTARIAN PARTY OF NORTH CAROLINA, SEAN HAUGH, AS EXECUTIVE DIRECTOR OF THE PARTY; PAMELA GUIGNARD AND RUSTY SHERIDAN, AS LIBERTARIAN CANDIDATES FOR MAYOR OF CHARLOTTE, NORTH CAROLINA; JUSTIN CARDONE AND DAVID GABLE, AS LIBERTARIAN CANDIDATES FOR CHARLOTTE CITY COUNCIL; RICHARD NORMAN AND THOMAS LEINBACH, AS LIBERTARIAN CANDIDATES FOR WINSTON-SALEM CITY COUNCIL; AND JENNIFER SCHULZ AS A REGISTERED VOTER, PLAINTIFFS, AND THE NORTH CAROLINA GREEN PARTY; ELENA EVERETT, AS CHAIR AND KAI SCHWANDES, AS CO-CHAIR OF THE PARTY; NICHOLAS TRIPLETT, AS A PROSPECTIVE NORTH CAROLINA GREEN PARTY CANDIDATE FOR PUBLIC OFFICE; HART MATTHEWS AND GERALD SURH, AS MEMBERS OF THE PARTY AND QUALIFIED VOTERS, INTERVENORS V. STATE OF NORTH CAROLINA; ROY COOPER, ATTORNEY GENERAL OF NORTH CAROLINA; STATE BOARD OF ELECTIONS; AND GARY O. BARTLETT, AS EXECUTIVE DIRECTOR OF THE STATE BOARD, DEFENDANTS

No. COA08-1413

(Filed 20 October 2009)

1. Appeal and Error— mootness—ballot requirements for new parties

An appeal in a challenge to the constitutionality of statutes concerning the requirements for a political party to appear on the ballot was not moot even though plaintiffs had obtained sufficient signatures on a petition to regain recognition as a political party. A political party must continue to meet the statutory requirements in order to retain its recognition and, if it fails to do so by the deadline, there would not be enough time before the next election to fully litigate the matter.

2. Appeal and Error— preservation of issues—arguments not advanced—authorities not cited

Certain arguments concerning the constitutionality of the qualification requirements for a political party to be on the ballot were deemed abandoned where arguments were not advanced nor relevant authority cited.

3. Elections— ballot requirements—not unconstitutional—compelling state interests

A statute concerning the requirements for a political party to be on the ballot in North Carolina implicated rights under the North Carolina Constitution as well as fundamental rights protected by parallel provisions in the federal constitution. There is no reason to determine that the State of North Carolina's interest in regulating the administration of its elections under the North Carolina Constitution is less compelling than the interest all

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states have in regulating the administration of elections under the federal Constitution.

4. Elections— ballot requirements—not unconstitutional— narrowly tailored state interests

The trial court did not err by holding constitutional a statute requiring a new political party to present a petition with registered voter signatures equaling two percent of those who voted in the last gubernatorial election to gain access to the ballot. Although appellants argued that the petition requirement is not narrowly tailored to meet the State's compelling interest, its unconstitutionality was not shown clearly, positively, and unmistakably beyond a reasonable doubt.

Judge CALABRIA concurring in part and dissenting in part.

Appeal by plaintiffs and intervenors from order entered 27 May 2008 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 20 April 2009.

Tharrington Smith, L.L.P., by Kenneth A. Soo and Adam S. Mitchell, for plaintiffs-appellants.

Elliot Pishko Morgan, P.A., by Robert M. Elliot, Cooperating Attorney for the American Civil Liberties Union of North Carolina Legal Foundation, and American Civil Liberties Union of North Carolina Legal Foundation, by Katherine Lewis Parker, for intervenors-appellants.

Roy Cooper, Attorney General, by Alexander McC. Peters, Susan K. Nichols, Karen E. Long, Special Deputy Attorneys General, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiffs ("plaintiffs-Libertarians") and intervenors ("intervenors-Greens") appeal from the trial court's determination that N.C.G.S. §§ 163-96(a)(1)-(2) and 163-97.1 do not violate Article I, Sections 1, 10, 12, 14, and 19, or Article VI, Sections 1 and 6, of the North Carolina Constitution. For the reasons stated, we affirm.

The parties stipulate to the following facts:

1. Historically, states, including North Carolina, have imposed requirements on political parties to gain and retain recognition for their parties and their affiliated candidates.

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2. To gain recognition in North Carolina, a political party has been required to submit a petition with the signatures of a number of registered voters supporting the recognition of that party; once a party has obtained recognition as a political party, its candidates have been listed on ballots throughout North Carolina.
3. From 1935 through 1981, the North Carolina signature requirement was 10,000 registered voters. North Carolina Code of 1935 § 5913.

. . . .

8. In 1983, the General Assembly increased the number of registered voter signatures required for recognition of a new political party . . . to two percent of the number who voted in the last gubernatorial election. 1983 Sess. Laws C. 576, § 1. Parties who are seeking recognition as political parties in North Carolina may begin gathering these signatures as soon as the gubernatorial election is over.
9. For the 2008 election, a party must submit 69,734 signatures from registered voters in order to gain recognition as a political party pursuant to N.C.G.S. § 163-96. These signatures must be submitted to the State Board of Elections by the first day of June.

. . . .

11. In order to retain recognition, a political party has historically been required to receive a threshold percentage of the votes cast statewide in the most recent gubernatorial or presidential election.
12. From 1935 to 1949, the ballot retention requirement was 3% of the statewide vote. North Carolina Code of 1935 § 5913.
13. In 1948, the States Right Party polled 8.8% of the vote.
14. In the next legislative session, the General Assembly raised the ballot retention requirement to 10% of the statewide vote.
15. Only one party other than the Democratic or Republican Party, the American Party in 1968, has ever met the 10% requirement. The Democratic and Republican Parties are the only two political parties to maintain continuous recognition since the enactment of N.C.G.S. §§ 163-96 and -97.

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16. Effective January 1, 2007, after the filing of this action on September 21, 2005, the General Assembly amended N.C.G.S. § 163-96 to lower the retention requirement to 2%. 2006 Sess. Laws C. 234, §§ 1 and 2.
17. Once a political party is officially recognized, under § 163-96 its candidate must receive at least 2% of the statewide vote for governor or president for the party to remain officially recognized and for its candidates to be listed on the ballot for any office anywhere in the state. Thus, even if candidates of the party receive more than two percent of the vote in a particular city or county, they cannot be listed on the ballot and their party identified in ballots in that community if the party did not receive two percent of the vote statewide.

. . . .

38. Persons desiring to get on the ballot in North Carolina can also qualify as unaffiliated candidates pursuant to N.C.G.S. § 163-122 and as write-in candidates pursuant to N.C.G.S. § 163-123, though in neither circumstance will the candidate's political party appear with a party label. N.C.G.S. § 163-122 requires unaffiliated candidates for statewide office to submit signatures of registered voters equal to two percent of the voters who voted in the most recent gubernatorial election; for district or local offices, signatures equal to four percent of the registered voters in that district or locality must be submitted. N.C.G.S. § 163-123 requires write-in candidates for statewide office to submit 500 signatures of registered voters.

The parties further stipulate that the Libertarian Party of North Carolina has been in continuous existence since 1976, and has achieved recognition as a political party in North Carolina in most recent elections through the petition process set forth in N.C.G.S. § 163-96(a)(2). On the other hand, members of the North Carolina Green Party "have never met the state's petition requirements; have never gained recognition as a political party pursuant to [N.C.G.S.] § 163-96; and consequently, have never received the benefits of party recognition, including the right to run as candidates for public office under the Green Party label."

On 21 September 2005, plaintiffs-Libertarians filed a declaratory judgment action seeking to declare "the state statutes governing the recognition of political parties" in violation of several provisions of

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the North Carolina Constitution. On 7 April 2006, intervenors-Greens filed a motion to intervene, which the trial court granted. On 26 February 2007, with the consent of defendants, plaintiffs-Libertarians and intervenors-Greens jointly filed a Second Amended Complaint asking the trial court to declare “the state statutes governing the recognition of political parties” in violation of the North Carolina Constitution under Article I, Sections 1, 10, 12, 14, and 19, and Article VI, Sections 1 and 6. Defendants filed their Answer to the Second Amended Complaint on 28 March 2007. Defendants moved the trial court to dismiss the action pursuant to North Carolina Rule of Civil Procedure 12(b)(6), and plaintiffs-Libertarians and intervenors-Greens filed a motion seeking summary judgment. The trial court denied both motions.

After considering the parties’ arguments and evidence, the Wake County Superior Court concluded that plaintiffs-Libertarians and intervenors-Greens failed to overcome the presumption that the challenged statutes are constitutional, and further concluded that N.C.G.S. §§ 163-96(a)(1)-(2) and 163-97.1 do not violate Article I, Sections 1, 10, 12, 14 and 19, or Article VI, Sections 1 and 6, of the North Carolina Constitution. Accordingly, on 27 May 2008, the trial court entered judgment in favor of defendants. On 10 June 2008, plaintiffs-Libertarians and intervenors-Greens gave timely notice of appeal to this Court from the trial court’s order.

[1] Defendants first raise the question of whether plaintiffs-Libertarians’ appeal is moot because defendants claim that “any decision of this Court cannot have a practical effect on [plaintiffs-Libertarians’] status as a recognized political party.” “[A] declaratory judgment should issue (1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.” *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002) (second alteration in original) (internal quotation marks omitted). When, during the course of litigation, “‘it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.’” *Pearson v. Martin*, 319 N.C. 449, 451, 355 S.E.2d 496, 497 (quoting *In re Peoples*, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978), cert. denied, 442 U.S. 929, 61 L. Ed. 2d 297 (1979)), *reh’g denied*, 319

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N.C. 678, 356 S.E.2d 789 (1987); *see also Morris v. Morris*, 245 N.C. 30, 36, 95 S.E.2d 110, 114 (1956) (“[A] moot question is not within the scope of our Declaratory Judgment Act.”). Nevertheless, when “(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again,” a case may be excepted from the mootness doctrine as being “capable of repetition, yet evading review.” *See Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (alterations in original) (internal quotation marks omitted), *disc. review denied*, 324 N.C. 543, 380 S.E.2d 770 (1989).

As we mentioned above, the only method by which the Libertarian Party has qualified to be recognized as a political party for candidates appearing on a North Carolina ballot in elections through 2008 has been by satisfying the 2% petition requirement set forth in N.C.G.S. § 163-96(a)(2). N.C.G.S. § 163-96(a)(2) provides:

[A political party within the meaning of the election laws of this State is a]ny group of voters which shall have filed with the State Board of Elections petitions for the formulation of a new political party which are signed by registered and qualified voters in this State equal in number to two percent (2%) of the total number of voters who voted in the most recent general election for Governor. Also the petition must be signed by at least 200 registered voters from each of four congressional districts in North Carolina. To be effective, the petitioners must file their petitions with the State Board of Elections before 12:00 noon on the first day of June preceding the day on which is to be held the first general State election in which the new political party desires to participate. The State Board of Elections shall forthwith determine the sufficiency of petitions filed with it and shall immediately communicate its determination to the State chairman of the proposed new political party.

N.C. Gen. Stat. § 163-96(a)(2) (2007). Once a political party is recognized, it can retain its recognition only if, “at the last preceding general State election, [that political party] polled for its candidate for Governor, or for presidential electors, at least two percent (2%) of the entire vote cast in the State for Governor or for presidential electors.” *See* N.C. Gen. Stat. § 163-96(a)(1) (2007). In the event that a recognized political party is unable to satisfy the 2% retention requirement set forth in N.C.G.S. § 163-96(a)(1), the political party “shall cease to

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be a political party within the meaning of the primary and general election laws” of Chapter 163 of the General Statutes. *See* N.C. Gen. Stat. § 163-97 (2007). Thus, in order to be recognized as a political party, that group of voters must once again satisfy the 2% petition requirement set forth in N.C.G.S. § 163-96(a)(2).

In the present case, after failing to garner sufficient votes to retain its recognition following the 2004 general election—in which “the Libertarian Party candidate for Governor received 52,513 votes (1.5% of the total votes cast) and the Libertarian Party candidate for President received 11,731 (0.5% of the total votes cast)” —the Libertarian Party was de-certified by the State Board of Elections on 27 August 2005. However, following its de-certification, “five people collected more than 85,000 signatures for the Libertarian Party.” As a result, “the Libertarian Party succeeded, following trial, in obtaining recognition as a political party for the 2008 election” in accordance with the 2% petition requirement of N.C.G.S. § 163-96(a)(2). Moreover, because the Libertarian Party’s 2008 candidate for governor garnered over 2% of the statewide vote for that office in the 2008 election, the Libertarian Party generated sufficient votes to retain recognition as a political party through the next gubernatorial and presidential elections in 2012, in accordance with the 2% retention requirement of N.C.G.S. § 163-96(a)(1). It is because of this success in retaining its recognition as a political party until 2012 that defendants claim plaintiffs-Libertarians’ appeal is moot.

Nevertheless, the Libertarian Party’s current status as a recognized political party through the 2012 general election does not exempt it from its obligation to continue to satisfy the requirement of N.C.G.S. § 163-96(a)(1) in order to retain its recognition, or from its obligation to satisfy the 2% petition requirement of N.C.G.S. § 163-96(a)(2) in the event that it is unable to retain its recognition as a political party. Additionally, in the event that the Libertarian Party is required to satisfy the 2% petition requirement set forth in subsection (a)(2) but fails to do so by the June preceding the “first general State election in which the new political party desires to participate,” *see* N.C. Gen. Stat. § 163-96(a)(2), the five or six months during which plaintiffs-Libertarians could bring a similar action challenging the constitutionality of the requirements of N.C.G.S. § 163-96(a)(1) and (2) would be too short to allow the matter to be fully litigated prior to the next election. Therefore, we hold that plaintiffs-Libertarians’ appeal is not moot.

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[2] Plaintiffs-Libertarians and intervenors-Greens assign as error the trial court's Conclusion of Law 17, in which the court concluded "[n]either the 2% retention requirement contained in [N.C.G.S.] § 163-96(a)(1) nor the 2% signature requirement contained in [N.C.G.S.] § 163-96(a)(2) violate Article I, §§ 1, 10, 12, 14 and 19, or Article VI, §§ 1 or 6, of the North Carolina Constitution." Appellants also assign as error the court's Conclusion of Law 18, in which the court concluded "[t]he provisions of [N.C.G.S.] § 163-97.1 do not violate Article I, §§ 1, 10, 12, 14 and 19, or Article VI, §§ 1 or 6, of the North Carolina Constitution." However, in their brief, with the exception of citing the constitutional provisions themselves, plaintiffs-Libertarians and intervenors-Greens have failed to advance an argument or cite relevant authority in support of their assertion that the statutes at issue implicate Article I, Sections 1 and 10, or Article VI, Sections 1 and 6, of the North Carolina Constitution. Additionally, plaintiffs fail to provide argument in support of their assignments of error which assert that N.C.G.S. §§ 163-96(a)(1) and 163-97.1 are unconstitutional under any of the aforementioned constitutional provisions. Therefore, since "[a]ssignments of error not set out in the appellant[s'] brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned," *see* N.C.R. App. P. 28(b)(6) (2009) (amended Oct. 1, 2009), we consider only whether N.C.G.S. § 163-96(a)(2) is violative of Article I, Sections 12 or 14, or of the "law of the land" clause of Section 19 of the North Carolina Constitution.

[3] Because the North Carolina Constitution "is a restriction of powers, and those powers not surrendered are reserved to the people to be exercised by their representatives in the General Assembly, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision." *Guilford Cty. Bd. of Educ. v. Guilford Cty. Bd. of Elections*, 110 N.C. App. 506, 510, 430 S.E.2d 681, 684 (1993) (citing *Wayne Cty. Citizens Ass'n v. Wayne Cty. Bd. of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991)). "Therefore, the judicial duty of passing upon the constitutionality of an act of the General Assembly is one of great gravity and delicacy. This Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality." *Id.* at 511, 430 S.E.2d at 684. "In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *Id.*

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"Only [our Supreme] Court may authoritatively construe the Constitution and laws of North Carolina with finality." *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 610, 304 S.E.2d 164, 170 (1983). Accordingly, "it must be remembered that in construing and applying our laws and the Constitution of North Carolina," neither this Court nor our Supreme Court is "bound by the decisions of federal courts, including the Supreme Court of the United States, although in our discretion we may conclude that the reasoning of such decisions is persuasive." *See State ex rel. Martin v. Preston*, 325 N.C. 438, 449-50, 385 S.E.2d 473, 479 (1989). "[W]e have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988). For all "practical purposes, therefore, the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision." *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998).

Federal courts have recognized that, "[a]s a rule, state laws that restrict a political party's access to the ballot always implicate substantial voting, associational and expressive rights protected by the First and Fourteenth Amendments." *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 (4th Cir. 1995), *cert. denied*, 517 U.S. 1104, 134 L. Ed. 2d 472 (1996); *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 93 L. Ed. 2d 499, 504 (1986) ("Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively, and may not survive scrutiny under the First and Fourteenth Amendments." (citation omitted)). "That is because 'it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech,'" *McLaughlin*, 65 F.3d at 1221 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 787, 75 L. Ed. 2d 547, 556 (1983)), and "because '[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes.'" *Id.* (alteration in original) (quoting *Williams v. Rhodes*, 393 U.S. 23, 31, 21 L. Ed. 2d 24,

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31 (1968); citing *Norman v. Reed*, 502 U.S. 279, 288, 116 L. Ed. 2d 711, 722-23 (1992); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214, 93 L. Ed. 2d 514, 523 (1986)).

As we acknowledged above, we cannot construe the provisions of the North Carolina Constitution to accord the citizens of North Carolina any lesser rights than those which they are guaranteed by parallel federal provisions in the federal Constitution. *See Carter*, 322 N.C. at 713, 370 S.E.2d at 555. Therefore, we conclude that the challenged statute, which has been held to implicate fundamental rights protected by parallel provisions in the federal Constitution, *see McLaughlin*, 65 F.3d at 1221, also implicates the fundamental associational and expressive rights protected by Article I, Sections 12 and 14 of our Constitution, as well as by the “law of the land” clause of Article I, Section 19. *See* N.C. Const. art. I, § 12 (“The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances”); N.C. Const. art. I, § 14 (“Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained”); N.C. Const. art. I, § 19 (“No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land.”); *see also Treants Enters., Inc. v. Onslow Cty.*, 94 N.C. App. 453, 462-63, 380 S.E.2d 602, 607 (1989) (“Our Supreme Court has held that the term ‘law of the land,’ as used in Article 1, Section 19 of the North Carolina Constitution, is synonymous with ‘due process of law’ as that term is applied under the Fourteenth Amendment to the United States Constitution.” (internal quotation marks omitted)).

“[A] law which burdens certain explicit or implied fundamental rights must be strictly scrutinized. It may be justified only by a compelling state interest, and must be narrowly drawn to express only the legitimate interests at stake.” *Treants Enters., Inc. v. Onslow Cty.* (*Treants* 86), 83 N.C. App. 345, 351, 350 S.E.2d 365, 369 (1986) (internal quotation marks omitted), *disc. review denied*, 319 N.C. 411, 354 S.E.2d 730, *aff’d*, 320 N.C. 776, 360 S.E.2d 783 (1987).

The United States Supreme Court has continuously held that “[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization’s candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.” *Jenness v. Fortson*, 403 U.S. 431, 442, 29 L. Ed. 2d 554, 562-63 (1971); *see also*

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Munro, 479 U.S. at 194, 93 L. Ed. 2d at 505 (“States have an undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot We reaffirm that principle today.” (omission in original) (citation and internal quotation marks omitted)). Moreover, the Supreme Court has “never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access.” *Munro*, 479 U.S. at 194-95, 93 L. Ed. 2d at 505. The Court determined that such a requirement “would necessitate that a State’s political system sustain some level of damage before the legislature could take corrective action.” *Id.* at 195, 93 L. Ed. 2d at 506. Instead, the Court concluded, “Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.” *Id.* at 195-96, 93 L. Ed. 2d 506. In the present case, we see no reason to determine that the State of North Carolina has any less of a compelling interest in regulating the administration of its elections under the North Carolina Constitution than do all states in regulating the administration of elections under the federal Constitution.

[4] Accordingly, we are left only to determine whether the 2% petition requirement set forth in N.C.G.S. § 163-96(a)(2) is “narrowly drawn to express only the legitimate interests at stake.” *See Treants* 86, 83 N.C. App. at 351, 350 S.E.2d at 369.

Plaintiffs-Libertarians and intervenors-Greens contend N.C.G.S. § 163-96(a)(2) is not the “least restrictive” means to serve the State’s interest because it is “undisputed” that North Carolina had “no substantial problems with its ballots” when the statutory requirement for the creation of a political party was limited to 10,000 signatures between 1929 and 1981, and that, when North Carolina required only 5,000 signatures for ballot access in 1982, there were only four political parties that qualified for recognition on the ballot. We recognize that the General Assembly’s former requirement that a group of voters collect the signatures of 10,000 registered voters is a considerably lower threshold than the State’s current 2% petition requirement. Nevertheless, we cannot agree with appellants’ assertion that, therefore, the State’s current 2% petition requirement is not narrowly tailored to meet the State’s compelling interest to ensure that, before a group is recognized by the State’s election laws, a political party must

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have some preliminary showing of a significant modicum of support among the current voting population of North Carolina.

When the Fourth Circuit considered the constitutionality of North Carolina's ballot access scheme under the federal Constitution, it determined that, "[w]hile all states condition ballot access on a showing of some preliminary [significant] modicum of support, it is beyond judicial competence to identify, as an objective and abstract matter, the precise numbers and percentages that would constitute the least restrictive means to advance the state's avowed and compelling interests." *McLaughlin*, 65 F.3d at 1222 (internal quotation marks omitted); see also *id.* (stating that "[t]his inquiry brings us into hazardous terrain"). For this reason, the Fourth Circuit adopted the approach taken by the Supreme Court in its review of such cases, and stated that "ballot access restrictions must be assessed as a complex whole[, whereby] . . . a reviewing court must determine whether 'the totality of the [state's] restrictive laws taken as a whole imposes a[n unconstitutional] burden on voting and associational rights.'" *McLaughlin*, 65 F.3d at 1223 (second and third alterations in original) (quoting *Williams*, 393 U.S. at 34, 21 L. Ed. 2d at 33).

Under North Carolina's 2% petition requirement, voters who sign any such petition are not required to join or support the party if it is recognized, nor are voters required to vote for the candidates of said party in the event that the party is recognized on the ballot. Additionally, a group has more than three-and-a-half years to gather signatures for their petition—from the time one gubernatorial election ends until the June preceding the next gubernatorial election. Cf. *Jenness*, 403 U.S. at 433, 29 L. Ed. 2d at 557-58 (upholding as constitutional a Georgia ballot access statutory scheme which provided that a political party could be recognized upon the filing of a petition bearing the signature of registered voters "of not less than five percent [(5%)] of the total number of electors eligible to vote in the last election for the filling of the office the candidate is seeking" and allowing the total time for circulating the petition of only 180 days).

We acknowledge, however, as did the Fourth Circuit in *McLaughlin*, that "[b]y directing that a political party cannot run a candidate for election to any office in the state unless it garners the petition support of 2% of the electorate," "the Libertarian Party (and potentially any other small party) has been forced to expend great effort to obtain statewide and local ballot access before each gubernatorial and presidential election only to lose that access *in toto* immediately thereafter." See *McLaughlin*, 65 F.3d at 1224. Neverthe-

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less, the Fourth Circuit ultimately upheld North Carolina's statewide recognition and retention requirements for political parties—which were then 2% and 10%, respectively—as constitutional under the Supreme Court's decision in *American Party of Texas v. White*, 415 U.S. 767, 39 L. Ed. 2d 744, *reh'g denied*, 416 U.S. 1000, 40 L. Ed. 2d 777 (1974). *See McLaughlin*, 65 F.3d at 1225 (stating that, in *American Party*, the ballot access scheme in Texas—like the one in North Carolina—“did not provide a separate avenue for small parties to run candidates for local elections”); *see also id.* at 1225 n.11 (noting that “the Texas and North Carolina [ballot access laws] are indistinguishable” with regard to their respective reliance on “statewide, rather than more localized, voting figures as the benchmark for determining whether a party has a sufficient modicum of voter support”).

While we agree with the Fourth Circuit's assessment that, under North Carolina's ballot access scheme, “the [S]tate inevitably burdens the associational rights of members of . . . small parties as well as the informational interests of all voters regardless of their party affiliation,” *see McLaughlin*, 65 F.3d at 1225, we also agree with the Supreme Court that “associational rights” are “not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively.” *See Munro*, 479 U.S. at 193, 93 L. Ed. 2d at 504. As we recognized above, “[t]he legislative department is the judge, within reasonable limits, of what the public welfare requires, and the wisdom of its enactments is not the concern of the courts.” *State v. Warren*, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960). “As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts—it is a political question.” *Id.* Because we conclude that a legislative enactment “must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground,” *see Guilford Cty. Bd. of Educ.*, 110 N.C. App. at 511, 430 S.E.2d at 684, we hold that the trial court did not err when it concluded that N.C.G.S. § 163-96(a)(2) was not violative of Article I, Sections 12 or 14, or of the “law of the land” clause of Section 19 of the North Carolina Constitution.

Affirmed.

Judge STEELMAN concurs.

Judge CALABRIA concurs in part and dissents in part.

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CALABRIA, Judge, concurring in part and dissenting in part.

I concur in the portions of the majority opinion holding that the claims of the Libertarian Party are not moot and applying strict scrutiny review to the instant case. However, I disagree with the majority's determination that N.C. Gen. Stat. §§ 163-96 and 163-97 ("the ballot access statutes") do not violate the North Carolina Constitution ("the State Constitution") and therefore, I must respectfully dissent from that portion of the majority opinion.

States remain free to interpret their own constitutions in any way they see fit, including constructions which grant a citizen rights where none exist under the Federal Constitution. *See Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985). Even where provisions of the State Constitution and Federal Constitution are identical, "we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988)(citations omitted). In construing the State Constitution, this Court is not bound by the decisions of federal courts, including the United States Supreme Court. *State ex rel. Martin v. Preston*, 325 N.C. 438, 449-50, 385 S.E.2d 473, 479 (1989)(citations omitted).

"All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2.

The will of the people as expressed in the Constitution is the supreme law of the land. In searching for this will or intent all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument. The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected.

State v. Emery, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) (internal citations omitted). Our State Constitution is not a grant of power. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961). All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people

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through their representatives in the Legislature is valid unless prohibited by that Constitution. *Id.*

Appellants bring their claims under Article I, §§ 1, 12, 14 and 19 of the State Constitution. Article I, § 1 provides that “all persons are created equal” and have the inalienable rights of “life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness”; § 12 contains the right of association (“The people have a right to assemble together . . .”); § 14 provides for freedom of speech; and § 19 includes the State Constitution’s equal protection and due process clauses. Appellants also bring claims under Article I, Section 10, which provides that “[a]ll elections shall be free”; under Article VI, Section 1, which establishes the right of all voters to vote for candidates of their choice; and under Article VI, Section 6, which establishes the right of every citizen to run for office. Appellants’ claims also implicate the right to vote, which our Supreme Court has called “one of the most cherished rights in our system of government, enshrined in both our Federal and State Constitutions.” *Blankenship v. Bartlett*, — N.C. —, —, — S.E.2d —, — (2009).

These provisions lead to the undeniable conclusion that the rights infringed upon by the ballot access statutes are fundamental under the State Constitution. “[A] law which burdens certain explicit or implied ‘fundamental’ rights must be strictly scrutinized. It may be justified only by a ‘compelling state interest,’ and must be narrowly drawn to express only the legitimate interests at stake.” *Treants Enterprises, Inc. v. Onslow Cty.*, 83 N.C. App. 345, 351, 350 S.E.2d 365, 369 (1986) (citations omitted). Thus, the ballot access statutes are subject to strict scrutiny review under the State Constitution.

A. Compelling Governmental Interest

The majority correctly holds that the State has a compelling interest in requiring some preliminary modicum of support before printing the name of a political party’s candidate on the ballot. This allows the State to avoid confusion, deception, and even frustration of the democratic process at the general election. This interest has repeatedly been recognized as compelling by the United States Supreme Court. *See Jenness v. Fortson*, 403 U.S. 431, 442, 29 L. Ed. 2d 554, 562-63 (1971); *Anderson v. Celebrezze*, 460 U.S. 780, 788, 75 L. Ed. 2d 547, 557 (1983); *Munro v. Socialist Workers Party*, 479 U.S. 189, 193-94, 93 L. Ed. 2d 499, 505 (1986). There is no reason that this interest should not be considered equally compelling under the State Constitution.

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B. Least Restrictive Means

The Fourth Circuit Court of Appeals in *McLaughlin v. North Carolina Bd. of Elections* held, “[w]hile all states condition ballot access on a showing of some ‘preliminary modicum of support,’ it is beyond judicial competence to identify, as an objective and abstract matter, the precise numbers and percentages that would constitute the least restrictive means to advance the state’s avowed and compelling interests.” 65 F.3d 1215, 1222 (4th Cir. 1995). Therefore, rather than determine whether the methods of the ballot access statutes are the least restrictive way to accomplish the State’s purpose, this Court must instead determine whether “the totality of the [state’s] restrictive laws taken as a whole imposes a[n unconstitutional] burden on voting and associational rights.” *Williams v. Rhodes*, 393 U.S. 23, 34, 21 L. Ed. 2d 24, 33 (1968). The *McLaughlin* Court referred to this test as an assessment of the “complex whole.” Using this test, the *McLaughlin* Court upheld the ballot access statutes under the United States Constitution. 65 F.3d at 1226. Because the State Constitution contains unique provisions regarding voting rights that are not contained in the United States Constitution, additional analysis of the ballot access statutes is necessary to determine if the “complex whole” in the instant case violates the State Constitution¹.

The people of the State of North Carolina chose to have a constitution which, in contrast to the United States Constitution, specifically governs suffrage and eligibility to office. Under the State Constitution, “[e]very person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided.” N.C. Const. art. VI, § 1. Additionally, “[e]very qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office.” N.C. Const. art. VI, § 6. Under the State Constitution, a voter who is otherwise qualified for office can be disqualified in only three situations:

First, any person who shall deny the being of Almighty God.²

1. Although the majority procedurally limits its review to Article I, §§ 12, 14, and 19 of the State Constitution, a proper review of the “complex whole” necessarily requires examination of all relevant provisions of the State Constitution.

2. The Attorney General of this State has issued an opinion that this provision violates U.S. Const. amend. I. See Opinion of Attorney General to Mr. Clyde Smith, Deputy Secretary of State, 41 N.C.A.G. 727 (1972).

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Second, with respect to any office that is filled by election by the people, any person who is not qualified to vote in an election for that office.

Third, any person who has been adjudged guilty of treason or any other felony against this State or the United States, or any person who has been adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, or any person who has been adjudged guilty of corruption or malpractice in any office, or any person who has been removed by impeachment from any office, and who has not been restored to the rights of citizenship in the manner prescribed by law.

N.C. Const. art. VI, § 8. In all other circumstances, the right of a qualified voter who is 21 years of age to run for election by the people is absolute.

“[A] constitution cannot be in violation of itself, and [] all constitutional provisions must be read *in pari materia*[.]” *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 394 (2002) (internal citations omitted). Reading these various provisions of the State Constitution *in pari materia*, “a serious problem is raised that has to be addressed.” *McLaughlin*, 65 F.3d at 1223. The *McLaughlin* Court was particularly troubled by the fact that

North Carolina provides no means by which a small party can nominate a candidate for any office in the state unless it secures the petition support of 2% of the persons who voted in the previous gubernatorial election. That means, for instance, that the [appellants] cannot nominate candidates . . . without first meeting the requirements to qualify as a statewide party. Even had [one of appellants’ candidates] for local or countywide office won her election, her ability to designate her party affiliation on the ballot for purposes of reelection would be conditioned on the party’s ability to register support elsewhere. (She could, of course, run for reelection as an independent candidate. But she would then be obligated to identify herself as “unaffiliated” on her ballot access petition, N.C. Gen. Stat. § 163-22(b), and, if her petition succeeded, would appear on the general election in the column headed “Unaffiliated Candidates.” § 163-140.) More generally, no party other than the Democrats and the Republicans can run a candidate in any election in the state in 1996 unless it submits a petition with 51,904 voters across the state (including at least 200

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in each of four congressional districts)—even if that far exceeds the number of persons registered to vote for that office.

Id. at 1223-24. The *McLaughlin* Court also noted “the Supreme Court cautioned . . . it may be impermissible for a state to ‘foreclose the development of any political party lacking the resources to run a statewide campaign.’” *Id.* at 1224 (quoting *Norman v. Reed*, 502 U.S. 279, 289, 116 L. Ed. 2d 711, 723 (1992)).

The fact that *unaffiliated* candidates can be placed on the ballot for local, district, and county offices by submitting a petition with signatures from 4% of the registered voters in that area . . . does not necessarily relieve the problem. The Supreme Court has recognized that “the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other.”

Id. (quoting *Storer v. Brown*, 415 U.S. 724, 745, 39 L. Ed. 2d 714, 732 (1974)). Although the *McLaughlin* Court felt it could not overturn North Carolina’s ballot access statutes without a more explicit holding from the United States Supreme Court, this Court is under no such constraint when analyzing the ballot access statutes under the State Constitution.

Although the State has a compelling interest in avoiding ballot confusion by requiring some preliminary modicum of support before printing the name of a political party’s candidate on the ballot, the compelling interests of the people of North Carolina as explicitly delineated in the State Constitution are thwarted by the ballot access statutes.

Qualified voters under the State Constitution who are affiliated with third parties and wish to exercise their right, enshrined in the State Constitution, to be eligible for election to office by the people in conjunction with their fundamental rights to free speech and association, can only do so by going through the onerous process of collecting almost 70,000 signatures for statewide recognition of their party. This situation exists even if the third party candidate simply seeks election to a local office in a small town where the total number of voters falls far below 70,000. Even if a third party is able to expend the effort required to successfully meet this burden and gain ballot access, there is still a significant likelihood that such access will be lost, *in toto*, immediately following the subsequent election, forcing the third party to begin the petition gathering process anew.

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The United States Supreme Court has recognized that “political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other.” *Storer*, 415 U.S. at 745, 39 L. Ed. 2d at 732. The State, in asserting its compelling interest in avoiding confusion, deception, and even frustration of the democratic process in the general election, fails to provide any basis, rational or otherwise, for why ballot access pursuant to the 4% local requirement for unaffiliated candidates pursuant to N.C. Gen. Stat. § 163-122 or the 500 vote write-in candidate provision of N.C. Gen. Stat. § 163-123 does not cause these ballot problems. The State instead asserts that allowing these same candidates the ability to identify their party on the ballot somehow has the potential to cause substantial problems. The treatment of unaffiliated and write-in candidates demonstrates that the State could regulate ballot access for political parties in a less restrictive way while still allowing the State to uphold its compelling interest.

North Carolina’s 2% statewide requirements for both ballot access and ballot retention place too onerous a burden on the fundamental rights of members of third parties under the State Constitution. The State, by permitting ballot access under far less burdensome requirements for unaffiliated candidates, has proven that it can accomplish its compelling interest in ballot regulation in a less restrictive fashion. It is ultimately the role of the Legislature, rather than this Court, to determine a precise method of ballot access and/or retention that is permissible under the State Constitution. Our Supreme Court has recognized “our limitations in providing specific remedies for [constitutional] violations committed by other government branches in service to a subject matter . . . that is within their primary domain.” *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 645, 599 S.E.2d 365, 395 (2004). However, the ballot access statutes must, at the very least, allow both political parties and unaffiliated candidates equal access to the ballot.

An analysis of the “complex whole” under the State Constitution must include consideration of the unique voting rights contained in the State Constitution, the inability of political parties lacking the resources to run a statewide campaign to gain ballot access, and the ability of unaffiliated and write-in candidates to run for local office with far less than the 2% statewide requirement for political parties. An analysis that includes these items as part of the “complex whole” of the ballot access statutes leads to the conclusion that the ballot access statutes are too restrictive to survive strict scrutiny under the

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State Constitution. I would hold that N.C. Gen. Stat. §§ 163-96 and 163-97 violate the State Constitution.

JAMES W. POWELL, JR., PLAINTIFF V. CITY OF NEWTON, A MUNICIPAL CORPORATION,
DEFENDANT AND THIRD-PARTY PLAINTIFF V. SHAVER WOOD PRODUCTS, INC., A
NORTH CAROLINA CORPORATION AND DICKSON ENGINEERING, INC., A NORTH
CAROLINA CORPORATION, THIRD-PARTY DEFENDANTS

No. COA08-1262

(Filed 20 October 2009)

1. Compromise and Settlement— enforcement of settlement agreement—statute of frauds

The trial court did not err by enforcing a settlement agreement because the essential terms of the contract were reduced to writing. Under judicial estoppel, plaintiff was not permitted to later assert in open court in the presence of a trial judge that he had not agreed to surrender a quitclaim deed to the disputed property in exchange for \$40,000.

2. Compromise and Settlement— binding settlement agreement—sufficiency of evidence

The trial court did not err by concluding as a matter of law based on competent record evidence that the parties had entered into a valid and binding settlement agreement of all issues.

3. Appeal and Error— appellate rules violations—not sufficiently egregious to warrant dismissal

The trial court did not err by dismissing defendants' cross-appeal seeking dismissal of plaintiff's appeal based on appellate rules violations, including untimely service of information concerning the transcript and proposed record on appeal, because the rules violations were not sufficiently egregious to warrant dismissal.

Judge WYNN dissenting.

Appeal by plaintiff from an order entered 27 May 2008 by Judge Yvonne Mims Evans and cross-appeal by defendant and third-party defendants from an order entered 19 August 2008 by Judge W. Robert Bell in Catawba County Superior Court. Heard in the Court of Appeals 5 May 2009.

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Crowe & Davis, P.A., by H. Kent Crowe, for plaintiff-appellant/cross-appellee.

Hamilton Moon Stephens Steele & Martin, PLLC, by Rebecca K. Cheney for third-party defendant-appellee/cross-appellant W.K. Dickson & Co., Inc.

Baucom Claytor Benton Morgan & Wood, PA, by M. Heath Gilbert, Jr. for defendant/third-party plaintiff-appellee/cross-appellant City of Newton.

Pope, McMillan, Kuttteh, Privette, Edwards & Schieck, PA, by William P. Pope, for third-party defendant-appellee/cross-appellant Shaver Wood Products, Inc.

JACKSON, Judge.

James W. Powell, Jr. (“plaintiff”) appeals the 27 May 2008 order requiring him to execute a settlement agreement and quitclaim deed. Defendant City of Newton (“the city”), third-party defendant Shaver Wood Products, Inc. (“Shaver”), and third-party defendant W.K. Dickson Engineering, Inc. (“Dickson”) (collectively “defendants”) appeal the 19 August 2008 order denying their motion to dismiss plaintiff’s appeal. For the reasons stated below, we affirm.

Plaintiff owns land located on Jacobs Fork River in Catawba County. Plaintiff’s land abuts land owned by the city. In 2004, the city decided to build a public park on its land, retaining Dickson to oversee the project. The city retained Shaver to harvest timber from an area which needed to be cleared for the construction project. On 2 December 2005, plaintiff filed a complaint against the city alleging, *inter alia*, that the city had improperly cut and removed hardwood trees from his land. On 2 November 2006, the city filed a third-party complaint against Dickson and Shaver seeking indemnification.

On 14 November 2007, during a trial on the matter, the parties informed the court that they had reached an agreement in settlement of their dispute. In exchange for plaintiff’s execution of a quitclaim deed to the disputed land, the city agreed to pay plaintiff \$30,000.00, while Dickson and Shaver agreed to pay plaintiff \$5,000.00 each, for a total sum of \$40,000.00. Attorneys for defendants and for plaintiff agreed to those terms. When asked if that was the agreement, plaintiff responded, “I don’t have any choice.” Plaintiff’s attorney informed him that he did have a choice. The court again asked plaintiff if that was his agreement, to which plaintiff responded, “Yes,

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that's my agreement." Counsel for the city noted that the agreement was subject to approval by the city council but that it was a mere technicality.

Thereafter, on 21 November 2007, a proposed written agreement was exchanged between attorneys. The proposed agreement was modified and forwarded to the parties on 27 November 2007. Additional correspondence was exchanged on 12 December 2007, regarding the draft quitclaim deed. Plaintiff refused to execute the agreement or abide by its terms; he claimed that the agreement was not knowingly, freely, and voluntarily made, and that it was coerced. On 30 January 2008, defendants sought a court order to enforce the settlement agreement. Plaintiff then discharged his attorney. The matter was heard on 5 May 2008, and the trial court entered its order enforcing the settlement agreement on 27 May 2008. Plaintiff appeals.

After plaintiff noticed his appeal, defendants filed motions to dismiss the appeal based upon violations of the North Carolina Rules of Appellate Procedure. On 19 August 2008, the trial court denied the motions. Defendants appeal.

[1] Plaintiff first argues that the trial court erred in enforcing the purported settlement agreement because it is void pursuant to the statute of frauds. We disagree.

"A compromise and settlement agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts." *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000) (citing *Casualty Co. v. Teer Co.*, 250 N.C. 547, 550, 109 S.E.2d 171, 173 (1959)). Matters of contract interpretation are questions of law. *Davison v. Duke University*, 282 N.C. 676, 712, 194 S.E.2d 761, 783 (1973) (citations omitted). This Court reviews questions of law *de novo*. *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999) (citing *Al Smith Buick Co. v. Mazda Motor of America*, 122 N.C. App. 429, 470 S.E.2d 552 (1996)).

Pursuant to North Carolina General Statutes, section 22-2, "[a]ll contracts to sell or convey any lands, . . . or any interest in or concerning them, . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." N.C. Gen. Stat. § 22-2 (2007). Contracts within the

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meaning of this section are required to be in writing, to prevent frauds and injuries. *Winberry v. Koonce*, 83 N.C. 351, 354 (1880). “The statute of frauds was designed to guard against fraudulent claims supported by perjured testimony; it was not meant to be used by defendants to evade an obligation based on a contract fairly and admittedly made.” *House v. Stokes*, 66 N.C. App. 636, 641, 311 S.E.2d 671, 675, *cert. denied*, 311 N.C. 755, 321 S.E.2d 133 (1984).

The statute of frauds requires “that all essential elements of the contract be reduced to writing.” *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 600, 173 S.E.2d 496, 503, *cert. denied*, 276 N.C. 728 (1970). “[T]he parties, the purchase price, and the property to be sold [—] ‘These are the essential elements of the contract.’” *Currituck Assocs.-Residential P’ship v. Hollowell*, 166 N.C. App. 17, 28, 601 S.E.2d 256, 264 (2004) (citing *Yaggy*, 7 N.C. App. at 600, 173 S.E.2d at 503).

Here, in open court, the parties—plaintiff, the city, Dickson, and Shaver—agreed that defendants would pay to plaintiff \$40,000.00 in exchange for plaintiff’s executing a quitclaim deed to the subject property. A transcript of the parties’ discussion with the trial court with respect to these basic elements was reduced to writing. In addition, the parties exchanged correspondence and a proposed “Settlement Agreement and Release” specifying the terms of the agreement more specifically, as well as a draft quitclaim deed. There can be no doubt that the essential terms of the contract were reduced to writing. The question before this Court is whether the writings were “signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized” as required by the statute of frauds. N.C. Gen. Stat. § 22-2 (2007).

We note that this was not some barroom conversation between drunken neighbors, agreed to in jest, and written on a random scrap of paper. See *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954). This was an agreement among four parties represented by counsel, in a court of law, supervised by the presiding judge, who inquired of each party whether the proposed terms were agreeable. The party to be charged—plaintiff—confirmed, “Yes, that’s my agreement.” Under these circumstances, we cannot sanction plaintiff’s conduct in disavowing the agreement by refusing to sign the document memorializing its terms in writing.

This concept may best be viewed in terms of judicial estoppel. In *Whitacre P’ship v. BioSignia, Inc.*, 358 N.C. 1, 591 S.E.2d 870 (2004), our Supreme Court set forth this State’s version of the doctrine, taken

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from the United States Supreme Court case of *New Hampshire v. Maine*, 532 U.S. 742, 149 L. Ed. 2d 968 (2001).

First, a party's subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Whitacre P'ship, 358 N.C. at 29, 591 S.E.2d at 888-89 (internal quotation marks and citations omitted). The essence of the doctrine is "to protect the integrity of the judicial process," *id.* at 28, 591 S.E.2d at 888, a central concern when, as here, a superior court judge has been personally involved in and sanctioned in open court, settlement of a pending case. Although our research discloses no North Carolina cases that have squarely addressed this issue, we believe that the reasoning of the Appeals Court of Massachusetts is persuasive.

The primary concern of the doctrine of judicial estoppel is to protect the integrity of the judicial process. That concern would be ill served if those intimately involved in that process, litigants, attorneys, and judges, could not rely on declarations of settlement made to the court. The force of oral agreements made in open court and acted on by the court, even in the face of statutory requirements of formality has long been recognized. It defies logic and fundamental principles of fairness to allow a represented party who has sought justice in a forum to contradict and undermine an agreement it reached and acknowledged in that same forum, especially when the judge and other litigants appear to have relied on that acknowledgement [sic].

Correia v. DeSimone, 614 N.E.2d 1014, 1016 (Mass. App. Ct. 1993) (internal quotation marks and citations omitted). "There is a strong judicial interest in the prompt reporting of settlements which militates against permitting the Statute of Frauds to be raised as a defense to the enforcement of a settlement agreement." *Id.*

Plaintiff's current position that he did not agree to surrender a quitclaim deed in exchange for \$40,000.00 clearly is inconsistent with

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his position before the trial judge that “[T]hat’s my agreement.” The judge was persuaded to accept plaintiff’s earlier position; the trial judge dismissed the jury and discontinued proceedings. Acceptance of plaintiff’s current position is simply untenable under these circumstances. If not estopped, plaintiff would impose an unfair detriment to defendants, who proceeded believing there was an agreement to settle the case. Pursuant to the doctrine of judicial estoppel, plaintiff ought not be permitted to now assert that he did not agree in open court in the presence of a trial judge to surrender a quitclaim deed to the disputed property in exchange for \$40,000.00.

“‘[A] writing or memorandum is ‘signed’ in accordance with the statute of frauds if it is signed by the person to be charged by any of the known modes of impressing a name on paper, namely, by writing, printing, lithographing, or other such mode, provided the same is done with the intention of signing.’” *Yaggy*, 7 N.C. App. at 598, 173 S.E.2d at 501 (quoting *Bishop v. Norell*, 353 P.2d 1022, 1025 (1960)). “The signing of a paper writing or instrument is the affixing of one’s name thereto, with the purpose or intent to identify the paper or instrument, or to give it effect as one’s act.” *McCall v. Institute*, 189 N.C. 775, 782, 128 S.E. 349, 353 (1925) (citation omitted). The “party to be charged” includes “some other person by him thereto lawfully authorized.” N.C. Gen. Stat. § 22-2 (2007).

[T]here is a presumption in North Carolina in favor of an attorney’s authority to act for the client he professes to represent. This presumption applies to both procedural and substantive aspects of a case. Special authorization from the client is required before an attorney may enter into an agreement discharging or terminating a cause of action on the client’s behalf. Where special authorization is necessary in order to make a dismissal or other termination of an action by an attorney binding on the client . . . it [is also] presumed . . . that the attorney acted under and pursuant to such authorization. One who challenges the actions of an attorney as being unauthorized has the burden of rebutting this presumption and proving lack of authority to the satisfaction of the court.

Harris, 139 N.C. App. at 829, 534 S.E.2d at 654-55 (internal quotation marks and citations omitted). Plaintiff did not object to his counsel’s participation in court discussions with respect to the terms of the settlement agreement. In fact, plaintiff admitted that the proposed terms constituted his agreement. At the time the agreement was reached in open court, plaintiff’s attorney had authority to act on plaintiff’s

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behalf to settle the suit. Further correspondence with respect to the details of that agreement were confirmatory in nature and prior to plaintiff's dismissal of counsel.

"The statute [of frauds] does not require all of the provisions of the contract to be set out in a single instrument. The memorandum required by the statute is sufficient if the contract provisions can be determined from separate but related writings." *Hines v. Tripp*, 263 N.C. 470, 474, 139 S.E.2d 545, 548 (1965) (citations omitted). The parties, by their conduct, impliedly agreed to conduct themselves via electronic means, subjecting themselves to the provisions of the Uniform Electronic Transactions Act. *See* N.C. Gen. Stat. § 66-315(b) (2007). Pursuant to that Act, plaintiff's counsel affixed his electronic signature to emails concerning the transaction. *See* N.C. Gen. Stat. § 66-312(9) (2007). When the hearing transcript, draft agreement, draft quitclaim deed, and associated emails are read together, as permitted by the statute of frauds, the settlement agreement that plaintiff was ordered to execute is in total compliance with the statute of frauds. Therefore, the trial court did not err in ordering plaintiff to execute the agreement.

This result is consistent with other jurisdictions that have considered the issue. In *Szymkowski v. Szymkowski*, 432 N.E.2d 1209 (Ill. App. Ct. 1982), in which the parties agreed in open court to settle their dispute by the payment of \$10,000.00 in exchange for a quitclaim deed, the Illinois Court of Appeals held that

[w]hen the trial court assents to a settlement, thereby rendering the sale one pursuant to order of the court, the trial court has impliedly made a determination as to the parties' consent and their attorneys' authority. The safeguards of the Statute of Frauds are fully met when a settlement is reached in open court in the presence of the parties.

Id. at 1212.¹

In *Fuchs v. Fuchs*, 409 N.Y.S.2d 414 (1978), the Supreme Court of New York enforced a settlement agreement entered into in open court but not executed thereafter. The Court held that "the transcript of the proceedings serves to establish the terms of the settlement and avoid conflicting claims as to what the parties intended. We

1. We note with caution, however, that the Illinois statute of frauds has a provision that it does not apply to "sales . . . by any officer or person pursuant to a judgment or order of any court in this state." 740 Ill. Comp. Stat. 80/2 (2008).

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are in agreement with those courts which have held the Statute of Frauds to be inapplicable in these circumstances.” *Id.* at 415 (citations omitted).

The oral stipulation was “definite and complete” and not a mere “agreement to agree” at some future time. It is clear that, under the terms of the agreement, the date of the oral stipulation was regarded as the date of settlement. The fact that certain aspects of the agreement were to be reduced to writing at a later date is not dispositive, since the parties gave “[m]utual manifestations of assent that are in themselves sufficient to make a contract[.]”

Id. (citations omitted). *See also Owens v. Lombardi*, 343 N.Y.S.2d 978, 981 (1973) (“[A] settlement agreement will not be impaired because of any restriction of the Statute of Frauds.”); John D. Calamari & Joseph M. Perillo, *Contracts* H.B. § 19-30(b) (3d ed. 1987) (“It seems to be well settled that an oral stipulation made in open court satisfies the Statute of Frauds even though the record is not signed by the party to be charged.”).

Based upon the foregoing, we cannot agree with plaintiff’s contention that the statute of frauds bars the order requiring that he execute the settlement agreement he entered into in open court. Plaintiff’s assignment of error is overruled.

[2] Plaintiff also argues that the trial court erred in concluding as a matter of law that the parties had entered into a valid and binding settlement agreement of all issues. We disagree.

Plaintiff appears to contend that the trial court did not support this conclusion of law with adequate findings of fact. Plaintiff states that “before the matter was completely resolved by a jury, the Appellees filed motions to enforce the terms of negotiations[.]” Plaintiff did not enter into “negotiations” in open court; plaintiff settled his case. He listened to the attorneys relate the terms of the settlement agreement to the judge, who then questioned each of the parties as to their assent to the terms as stated. Plaintiff informed the judge that “that’s *my* agreement” (emphasis added).

The trial court concluded as a matter of law that “[p]laintiff entered into a valid and binding settlement of all issues” and that defendants were entitled to enforce that settlement. In support of that conclusion, the trial court made the following findings of fact:

2. During the course of the Trial, counsel for Plaintiff, Defendant City of Newton and Third-Party Defendants, Shaver Wood

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Products, Inc. and W.K. Dickson Engineering, Inc. advised the Court that the parties had reached a settlement of all pending issues;

3. The terms and conditions of the settlement were recited into the record, and the presiding Judge, the Honorable James W. Morgan, confirmed with Plaintiff, James W. Powell, that he knowingly and voluntarily entered into the settlement of all issues, and further, the Court confirmed the terms and conditions of the settlement with Plaintiff;

4. That the terms and conditions of the settlement were thereafter confirmed in writing via electronic mail communications between counsel for Plaintiff and Defendant;

5. That the sum of \$40,000.00 was delivered to counsel for Plaintiff along with a Settlement Agreement and Release and quitclaim deed, but Plaintiff failed and refused to execute said documents and failed and refused to consummate the settlement as agreed.

These findings of fact are supported by competent evidence in the record and are sufficient to support the trial court's conclusion of law. This argument is without merit.

[3] In their cross-appeal, defendants argue that the trial court erred in not dismissing the appeal for appellate rules violations. They contend that pursuant to *Dogwood Dev. and Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008), the violations were sufficiently gross to warrant dismissal. We disagree.

Defendants contend that the appeal should have been dismissed because (1) information concerning the transcript was not timely served, notwithstanding the fact that the transcript itself was served more than two weeks prior to the filing of the notice of appeal, pursuant to Rule 7(a) of the North Carolina Rules of Appellate Procedure, and (2) the proposed record on appeal was not timely served, pursuant to Rule 11(a) and (b). Defendants filed a motion with this Court to dismiss the appeal for the same rules violations. We denied the motion. We do not deem these rules violations sufficiently egregious to warrant dismissal of plaintiff's appeal.

Affirmed.

Judge HUNTER, JR., Robert N. concurs.

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Judge WYNN dissents in a separate opinion.

WYNN, Judge, dissenting.

“Land is regarded as such a high species of property that exceptional safeguards have been devised for the preservation and security of its title”² In recognition of the need for safeguards against fraud and ambiguity in the sale or conveyance of land, the North Carolina General Statutes requires: “All contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.” N.C. Gen. Stat. § 22-2. Because there was no written settlement agreement or memorialization signed by the Plaintiff in the present case, I would hold that the trial court erred by concluding that the Statute of Frauds does not apply.

I respectfully disagree with the majority’s conclusion that the settlement agreement at issue in this case was in “total compliance with the statute of frauds.” As the majority opinion recognizes, the parties informed the judge during trial that they had reached a verbal settlement agreement regarding their dispute. In open court, the counsel for the City of Newton informed the trial judge “the plaintiff and defendant have settled this case for the sum of \$40,000 in exchange for which the plaintiff has agreed to execute a Quitclaim deed to the City for this tract of land that’s depicted in Plaintiff’s exhibit 1, the 3.122 acres.” The trial court then conducted the following inquiry of Plaintiff:

THE COURT: Is that your agreement, sir?

[THE PLAINTIFF]: I don’t have any choice. THE COURT: Well—

[PLAINTIFF’S COUNSEL]: You do have a choice.

THE COURT: I understand your sentiment, sir. But is that your agreement?

[THE PLAINTIFF]: Yes, that’s my agreement.

The record and hearing transcript indicate that counsel for the City of Newton circulated a written proposed settlement agreement on 21 November 2007 via e-mail, seven days after the trial court’s inquiry. Additionally, neither the parties nor their attorneys signed either of

2. *Davis v. Ely*, 104 N.C. 16, 23, 10 S.E. 138, 140 (1889).

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the two “Settlement Agreement and Release” documents included in the record.

In my view, (I) the unsworn exchange in court was insufficient to satisfy the Statute of Frauds; (II) emails from Plaintiff’s counsel did not constitute an electronic signature to an agreement that was purportedly already agreed to and approved by the trial court; and (III) any agreement reached during the trial court session was conditional and not mutual because the “agreement” was subject to approval by the City Council.

I.

First, I do not agree with the majority’s contention that the exchange between Plaintiff and the trial judge was sufficient to satisfy the Statute of Frauds. Although I acknowledge the majority’s contention that other jurisdictions have found “oral stipulations” made in open court to satisfy the Statute, no North Carolina court has done so, and the facts of this case do not compel such a recognition. While a number of jurisdictions recognize a “judicial admission exception” to the Statute, even if this Court were to adopt such an exception, the exception would not be applicable to the statements made in the instant case.

In *Gibson v. Arnold*, 288 F.3d 1242, 1246-47 (10th Cir. 2002), the U.S. Court of Appeals for the Tenth Circuit noted that “virtually every court that has addressed the issue during the last twenty-five years has held that judicial admissions are an exception to the statute of frauds.” However, such jurisdictions have generally limited the “judicial admissions exception” to admissions by sworn testimony, deposition, pleading, or sworn affidavit. *See, e.g., Flight Sys., Inc. v. Elec. Data Sys. Corp.*, 112 F.3d 124, 127-28 (3d Cir. 1997) (applying exception to admission of the contract in pleadings or testimony); *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 142 (6th Cir. 1983) (applying exception to admission in deposition); *Litzenberg v. Litzenberg*, 514 A.2d 476, 480 (Md. 1986) (recognizing the exception applies to admissions by sworn testimony or deposition, or in pleadings). Here, Plaintiff was not under oath at the time of his statement, nor was there an “admission” to the existence of an agreement in any writings submitted to the court.

Further, I note that *Szymkowski*, on which the majority relies, is distinguishable. In *Szymkowski*, the Illinois Court of Appeals held the Statute of Frauds inapplicable to an oral settlement agreement

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approved and evidenced in the trial court's order, entered the same day. *Szymkowski*, 432 N.E.2d at 1212. However, as the majority notes, Illinois' law contains a provision excepting sales "pursuant to a judgment or order of any court in this state" from the Statute of Frauds such that "any subsequent performance of the settlement would have been 'pursuant to order of the court' and therefore within the statutory exception to the Statute of Frauds." *Szymkowski*, 432 N.E.2d at 1211-12 (emphasis in first omitted). Because section 22-2 of the North Carolina General Statutes governing contracts for the sale of land contains no such statutory exception, *Szymkowski* is inapplicable.

Accordingly, I do not support the conclusion that the in court exchange acknowledging that the parties had reached a *verbal* agreement constituted an exception to the Statute of Frauds.

II.

Additionally, I disagree with the majority's argument in the alternative, that a memorialization of the oral settlement agreement was *electronically* "signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." N.C. Gen. Stat. § 22-2. As the majority notes, "'a writing or memorandum is 'signed' in accordance with the statute of frauds if it is signed by the person to be charged" *Yaggy*, 7 N.C. App. at 598, 173 S.E.2d at 501 (quoting *Bishop*, 353 P.2d at 1025) (citations omitted).

Section 66-312(9) defines an "electronic signature" as "an electronic sound, symbol, or process attached to, or logically associated with, a record and executed or adopted by a person with the intent to sign the record." N.C. Gen. Stat. § 66-312(9). The official comment further explains that an electronic signature includes "one's name as part of an electronic mail communication." N.C. Gen. Stat. § 66-312(9) official commentary.

Here, the record on appeal contains no email communication originated by Plaintiff or his counsel. Indeed, the record shows no electronic communication containing any electronic signature by either Plaintiff or his counsel that would evidence an intent to sign the communication. Accordingly, I can find no evidence to support the conclusion that a writing was "signed" by either Plaintiff or his counsel. See *Sel-Lab Marketing, Inc. v. Dial Corp.*, 48 U.C.C. Rep. Serv. 2d 482 (S.D. N.Y. 2002) (holding series of emails memorializing agreement did not satisfy Statute of Frauds, in part, because none of the emails were signed by the party to be charged).

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III.

Finally, I would hold that the parties did not mutually agree to a settlement because the settlement was conditioned upon the approval of the City Council.

“Mutuality of promises means that promises to be enforceable must each impose a legal liability upon the promisor. Each promise then becomes a consideration for the other.” *Wellington v. Dize Awning & Tent Co.*, 196 N.C. 748, 751, 147 S.E. 13, 15 (1929). In contracts involving the sale of realty, the issue has occasionally arisen that the promise of the purchaser is contingent upon his securing adequate financing. In such cases, this Court has held the purchaser’s promise not illusory where it is “accompanied by an implied promise of good faith and reasonable effort” to secure such financing. *Mezzanotte v. Freeland*, 20 N.C. App. 11, 17, 200 S.E.2d 410, 415 (1973), *cert. denied*, 284 N.C. 616, 201 S.E.2d 689 (1974).

Other cases, however, have held that where an agreement is made subject to the approval of another promisor, there can be no implied promise, and thus there is no mutuality of obligation to support the agreement. In *Hilliard v. Thompson*, for example, W.L. Thompson contracted with WH & G Realty Inc. to sell a piece of realty in Durham County for \$70,000. 81 N.C. App. 404, 344 S.E.2d 589 (1986). The purchasers tendered a check to Thompson in the amount of \$500, and the parties agreed that Thompson would take the contract home to be signed by his wife. That night, Thompson called one of the purchasers and said his wife wouldn’t sign the contract unless the price was raised. The purchasers agreed to the new price, and it was agreed that all parties would meet to amend the contract the following day. The next day, Thompson returned the check and told the purchasers he had found a buyer willing to pay more. The property was sold to a third party before WH & G could meet the higher offer. WH & G sued, claiming breach of contract. The trial court awarded summary judgment for defendant based on lack of mutuality. In affirming the trial court’s ruling, this Court stated:

One of the terms of the alleged contract provided that William L. Thompson deliver to the plaintiffs a general warranty deed which would contain a fee simple marketable title. Without the signature of his wife Mr. Thompson could not have delivered such a deed. The plaintiffs would not have been liable on the contract if Mr. Thompson had sued them. There was not a mutuality of obligation.

Id. at 406-07, 344 S.E.2d at 590.

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This holding accords with the decisions of other courts that have considered the issue in situations more analogous to the one *sub judice*. In *Heuser v. Kephart*, the Tenth Circuit, applying “basic contract rules”, reviewed a settlement agreement between a municipality and an individual that was contingent upon approval of the settlement amount by the City Council. 215 F.3d 1186, 1191 (10th Cir. 2000). “The district judge found that the consideration, which she also found had been specifically bargained for, was the [City] attorneys’ promise to recommend the terms of the proposed settlement to their clients.” *Id.* On appeal, the agreement was held unenforceable for lack of mutuality:

The [County and City] were completely free to choose between two alternatives—they could accept the attorneys’ recommendation and extend the offer, or they could reject the recommendation. Obviously, if the [County and City] were to choose the second alternative, [the other party] would have received nothing in exchange for their agreement. . . . Where, as here, a party “has an unfettered choice of alternatives, and one alternative would not have been consideration if separately bargained for, the promise in the alternative is not consideration.”

Id. (quoting Restatement (Second) of Contracts § 77, cmt. b (1981)). See also *Mastaw v. Naiukow*, 306 N.W.2d 378, 380 (Mich. Ct. App. 1981) (“Since the Detroit Common Council had unfettered discretion to accept or reject the settlement, its options were in no way limited by the supposed settlement.”).

In the present case, the attorney for the municipality made clear to the court that the agreement was contingent upon receiving the blessing of the City Council. Contrary to what the attorney stated, this was not “just a technicality.” Indeed, the attorney’s recommendation was susceptible to the City Council’s rejection.

I would hold that because the purported agreement presented in open court was nonbinding and conditional, the trial court’s colloquy with Plaintiff did not warrant the invocation of the doctrine of judicial estoppel in this case. As Defendants’ counsel stated during the open court session, the purported agreement was still subject to approval by the City. Though characterized as a “mere technicality”, this condition meant that Defendants were not bound by the agreement after the open court session until the City Council approved it, whereas the majority’s holding indicates that Plaintiff was so bound by purported agreement after the open court

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session and before the City Council approved the purported agreement. That result is not what was intended by the invocation of the doctrine of judicial estoppel.

In sum, I would hold that the trial court erred by concluding that Plaintiff entered into a “valid and binding” settlement agreement because (I) the record on appeal fails to establish the compliance with the Statue of Frauds, (II) the exchange of emails after the open court session did not constitute an electronic signature by Plaintiff’s counsel to an agreement, and (III) the discussions during the open court session concerned a purported subject to approval by the City Council.

MOSS CREEK HOMEOWNERS ASSOCIATION, INC., DELORIS GAIL BENTON, JO ANNE K. BISHOP, JANICE HAMBY, DAVID L. HAMILTON, DAVID J. KNOCHE, AND CHARLES F. PEELER, PLAINTIFFS V. TED L. BISSETTE, MARY HOLLY BISSETTE, SCOTT W. RICH, LAURA K. RICH, AND PROVIDENT FUNDING ASSOCIATES, LIMITED PARTNERSHIP, DEFENDANTS V. TED L. BISSETTE AND MARY HOLLY BISSETTE, SCOTT W. RICH AND LAURA K. RICH, THIRD PARTY PLAINTIFFS V. TERRY MILLER, JIM BENTON, ANGELA PEELER, FRED BISHOP AND PEGGY HAMILTON, THIRD PARTY DEFENDANTS

No. COA08-1156

(Filed 20 October 2009)

1. Deeds— restrictive covenants—interpretation—unambiguous contract

The trial court did not err by awarding summary judgment against the Bissettes on the issue of whether restrictive covenants were ambiguous where the covenants forbade the subdivision or reduction of size of any lot and the Bissettes undisputedly reduced the size of a lot. Although the Bissettes contended that there was an ambiguity in the covenants because covenants must be interpreted through the statutes and subdivision regulations, the acceptance of a deed incorporating covenants creates a contract, and contracts must be construed as written if plain and unambiguous.

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2. Appeal and Error— preservation of issues—theory not raised at trial—failure to cite authority—failure to apply facts from record

The Bissettes could not argue on appeal a theory other than that raised before the trial court. Even had it been raised below, the Bissettes cited no authority supporting their contention and, furthermore, they did not apply facts from the record to support the case law cited on their further argument concerning affirmative defenses.

3. Attorney fees— restrictive covenants—not amended— statutory authority not included

An award of attorney fees without statutory authority was reversed where the fees were incurred in an action arising from the subdivision and sale of a lot contrary to restrictive covenants. The Declaration of Covenants was not amended to incorporate statutory revisions authorizing the recovery of attorney fees in an action to enforce restrictive covenants.

4. Appeal and Error— preservation of issues—failure to cite legal authority

A contention regarding an award of attorney fees after a punitive damages claim was not reviewed on appeal where no legal authority was cited in support of the argument.

5. Contempt— attorney fees—no statutory authority

Outside of family law, statutory authority is required for enforcement of contempt, and the trial court here by awarding attorney fees incurred in enforcing contempt orders.

6. Civil Procedure— dismissal—underlying finding not challenged

No error was found in the dismissal of a claim for breach of fiduciary duty where the trial court's finding that a pleading was not sufficient to show a right to relief was not challenged.

Appeal by Ted and Mary Bissette (as defendants and third-party plaintiffs) from orders entered 3 May 2006 by Judge John O. Craig III, 29 December 2006 by Judge Ronald E. Spivey, 26 March and 12 June 2007 by Judge Steve A. Balog, 30 April 2007 by Judge Edgar B. Gregory, 28 November 2008 by Judge Paul C. Ridgeway, and 12 and 13 February and 4 March 2008 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 21 April 2009.

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Robertson, Medlin & Blocker, PLLC, by John F. Bloss for defendants and third-party plaintiff-appellants.

Forman Rossabi Black, P.A., by T. Keith Black and Emily J. Meister; and Gregory A. Wendling, for plaintiffs and third-party defendant-appellees.

HUNTER, JR., Robert N., Judge.

Ted and Mary Bissette (the “Bissettes”) appeal from orders: (1) granting plaintiffs’ and third-party defendants’ summary judgment motion, (2) dismissing their claim for breach of fiduciary duty, and (3) awarding attorneys’ fees for contempt and enforcement of subdivision restrictions. We affirm in part and reverse in part.

FACTS

Moss Creek is a single-family residential development in Guilford County, North Carolina, developed by Moss Creek Land Development Company, Inc. (“Development Company”). On 18 June 1987, the Moss Creek Homeowners Association, Inc. (the “Association”) was incorporated; and following incorporation, Development Company filed a Declaration of Covenants, Conditions, and Restrictions for Moss Creek (the “Declaration”) and the Bylaws of Moss Creek Home Owners Association (the “Bylaws”) with the Guilford County Register of Deeds.

The Declaration reserves to the Development Company, as “declarant,” certain approval rights restricting purchasers of lots from locating buildings on lots, installing well and septic tanks, erecting mailboxes, and altering landscaping on property without the Association’s approval. Moreover, the Declaration gives to the Association a first right of refusal to purchase lots and provides the Declarant, the Association or any lot owner the right to sue to enforce the covenants. Section 5 of Article III of the Declaration provides in particular that “[n]o Lot covered by this Declaration may be subdivided by sale or otherwise as to reduce the total area of the Lot as shown on the maps and plats of any Sections of Moss Creek referred to above except by written [sic] consent of the Declarant.”

On 30 January 1990, Development Company transferred its rights as “declarant” to Byron Investments, Inc. (“Byron”). Byron filed for bankruptcy protection in 1991, and received its discharge from bankruptcy on 24 August 2005. On 23 December 1993, the Bissettes acquired title to Lot 6 in Moss Creek Development, and subsequently built a house on the lot.

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On 5 July 2002, the Bissettes acquired title to the parcel of property adjoining their lot known as Lot 8, and on 10 November 2003, the Bissettes recorded an Instrument of Combination combining the two lots formally. The Bissettes thereafter recorded a plat on 5 December 2003 which (1) split former Lot 8 into two pieces and labeled the new parcels Lot 1 and Lot 2, and (2) recombined Lot 6 and Lot 2 to create a new L-shaped Lot 6 which expanded the backyard of the Bissettes. On 27 January 2004, the Bissettes placed a deed of trust on the combined property of Lot 6 and Lot 2 for \$165,500.00 payable to Provident Funding Associates, L.P. ("Provident").

On 21 August 2004, the Association placed the Bissettes on notice that the Association would conduct a hearing on 31 August 2004 to determine whether the Bissettes were in violation of the subdivision covenant in the Declaration. The Bissettes failed to appear at the hearing, and were fined by the Association until such time as the violation was remedied.

Without prior notice to the Association, the Bissettes sold Lot 1 to Scott and Laura Rich (the "Riches") on 28 April 2005. The sale of Lot 1 and the architectural plans of the Riches' home to be constructed thereon were not approved by the Association prior to the beginning of the construction of their house on 2 May 2005.

PROCEDURAL HISTORY

The Association, Deloris Gail Benton, Jo Anne K. Bishop, Janice Hamby, David L. Hamilton, David J. Knoche, and Charles F. Peeler (collectively "plaintiffs") filed a complaint for the present action on 18 May 2005. The Bissettes filed an answer, counterclaim, and third-party complaint against Terry Miller, Jim Benton, Angela Peeler, Fred Bishop and Peggy Hamilton (the "board members") on 25 July 2005. The Bissettes filed a motion for summary judgment on 17 November 2005.

Plaintiffs filed their amended complaint on 7 June 2006, and sought declaratory and injunctive relief against the Bissettes and Riches for violating the restrictive covenants. Plaintiffs further asked the trial court to void the deed of trust executed by the Bissettes to Provident.

On 7 July 2006, the Bissettes filed an answer to the amended complaint while renewing their counterclaim and third-party complaint. The Bissettes' amended pleading denied liability as to plaintiffs' amended complaint; affirmatively pled laches, waiver, and estoppel;

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and sought damages for slander and breach of fiduciary duty against the board members.

Provident filed an answer and cross-claim against the Bissettes on 11 July 2006; and on 17 July 2006, the Association filed a motion for summary judgment on all claims pending against the Bissettes. On 1 August 2006, plaintiffs and the board members (collectively “appellees”) filed a Rule 12 motion to dismiss, motion for judgment on the pleadings, motion for more definite statement, motion to strike, and motion for Rule 41 sanctions including involuntary dismissal against the Bissettes.

On 29 December 2006, Judge Ronald E. Spivey entered an order granting summary judgment to appellees: (1) denying the Bissettes’ summary judgment motion; (2) finding that the Bissettes had violated the restrictive covenants; and (3) denying all the Bissettes’ defenses “including but not limited to[:]”

laches, waiver, estoppel, improper election of [the Association’s board of directors,] that Defendant Mary Holly Bissette and/or [Byron] constitute the Declarant [in the Declaration], and approval/ratification of [the Bissettes’] actions by any person or entity.

The order further provided that the Bissettes pay: \$16,290.00 in fines to the Association, \$6,673.66 in costs of the action, and \$60,026.07 in “partial” attorney fees to plaintiffs.

Judge Spivey entered a simultaneous second order with regard to appellees’ motions under Rules 12 and 41 of the North Carolina Rules of Civil Procedure, and awarded appellees an additional \$11,656.25 in attorneys’ fees and \$240.79 in costs to be paid by the Bissettes within 45 days. The second order also denied appellees’ requested Rule 41 motion, granted appellees’ motion for a more definite statement on the issue of breach of fiduciary duty, and directed the Bissettes to file a more definite statement no later than 30 days from 29 December 2006.

On 29 January 2007, the Bissettes filed a more definite statement. On 14 February 2007, appellees renewed their Rules 12 and 41 motions to dismiss, and moved further for sanctions contending that the Bissettes had failed to comply with Judge Spivey’s prior orders. On 15 February 2007, plaintiffs filed a show cause motion for contempt claiming that the Bissettes had failed to timely pay the costs awarded in the first 29 December 2006 order. On 7 March 2007,

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appellees filed a show cause motion on the Bissettes' failure to pay the costs assessed in the second 29 December 2006 order.

Contempt hearings were held on 6 and 30 March 2007, and Judge Steve A. Balog found the Bissettes in willful contempt. Despite multiple opportunities to purge themselves of contempt, the Bissettes failed to do so, additional legal fees were awarded, and Mary Holly Bissette was briefly incarcerated.

On 17 January 2008, the Bissettes moved for summary judgment arguing that the Declaration should be rescinded or reformed. Judge James M. Webb denied their motion on 4 March 2008, and granted plaintiffs' motion for summary judgment on "any remaining claims not previously adjudicated." Notice of appeal was properly given, and this Court has jurisdiction to hear the matter. N.C. Gen. Stat. § 1-279.1 (2007).

STANDARD OF REVIEW

The standard of review on a summary judgment motion is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, 276 S.E.2d 283 (1981); *Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E.2d 252, 256, *disc. review denied*, 295 N.C. 733, 248 S.E.2d 862 (1978). "In ruling on the motion, the court must consider the evidence in the light most favorable to the nonmovant, who is entitled to the benefit of all favorable inferences which may reasonably be drawn from the facts proffered." *Averitt v. Rozier*, 119 N.C. App. 216, 218, 458 S.E.2d 26, 28 (1995). Summary judgment may be properly shown by a party: "'(1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense.'" *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 10, 652 S.E.2d 284, 292 (2007) (quoting *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003)), *appeal dismissed, disc. review denied*, 362 N.C. 177, 658 S.E.2d 485 (2008).

DISCUSSION

In reviewing litigation involving restrictive covenants, this Court has held that restrictive covenants are contractual in nature, and that acceptance of a valid deed incorporating covenants implies the exist-

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ence of a valid contract with binding restrictions. *See Rodgers v. Davis*, 27 N.C. App. 173, 178, 218 S.E.2d 471, 475, *disc. review denied*, 288 N.C. 731, 220 S.E.2d 351 (1975). Restrictive covenants, “clearly and narrowly drawn,” are recognized as a valid tool for achieving a common development scheme. *Hobby & Son v. Family Homes*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981). Parties to a restrictive covenant may use almost any means they see fit to develop and enforce the restrictions contained therein. *Wise v. Harrington Grove Cmty. Ass’n*, 357 N.C. 396, 401, 584 S.E.2d 731, 735, *reh’g denied*, 357 N.C. 582, 588 S.E.2d 891 (2003). Restrictive covenants are to be strictly construed and “all ambiguities will be resolved in favor of the unrestrained use of land.” *Hobby & Son*, 302 N.C. at 70, 274 S.E.2d at 179. Nonetheless, a restrictive covenant “must be reasonably construed to give effect to the intention of the parties, and the rule of strict construction may not be used to defeat the plain and obvious purposes of a restriction.” *Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 85, 362 S.E.2d 619, 621 (1987), *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988). Therefore, enforcing a restrictive covenant through summary judgment is proper unless genuine issues of material fact exist showing either: (1) the contract is invalid; (2) the effect of the covenant “impair[s] enjoyment of the estate”; or (3) a term of the covenants “is contrary to the public interest.” *Page v. Bald Head Ass’n*, 170 N.C. App. 151, 155, 611 S.E.2d 463, 466, *disc. review denied*, 359 N.C. 635, 616 S.E.2d 542.

Summary Judgment

On appeal, the Bissettes first contend that the trial court erred in awarding summary judgment because there existed material issues of fact sufficient to show that: (1) the restrictions in the Declaration are sufficiently ambiguous to require jury interpretation; (2) the bankruptcy of Byron rendered the restrictions unenforceable; and (3) the forecast of evidence of their affirmative defenses raised sufficient factual issues to overcome summary judgment. We disagree.

[1] As to the Bissettes first argument, the restrictive covenant at issue in this case provides:

No Lot covered by this Declaration may be subdivided by sale or otherwise as to reduce the total area of the Lot as shown on the maps and plats of any Sections of Moss Creek referred to above except by written [sic] consent of the Declarant.

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Section 12 of Article I of the Declaration defines “Lot” as “a portion of the Properties other than the Common Area intended for any type of independent ownership and use as may be set out in this Declaration and as shall be shown on the plats of survey filed with this Declaration or amendments thereto.”

The Bissettes attempt to create ambiguity by contending that the obvious language of these terms must be interpreted through definitions contained in North Carolina’s General Statutes and Guilford County’s subdivision regulations.¹ However, this Court has consistently stated that “ ‘[w]here the language of a contract is plain and unambiguous . . . [a] court may not ignore or delete any of its provisions, nor insert words into it, *but must construe the contract as written[.]*’ ” *Hemric v. Groce*, 169 N.C. App. 69, 76, 609 S.E.2d 276, 282 (citation omitted) (emphasis added), *cert. denied and disc. review dismissed*, 359 N.C. 631, 616 S.E.2d 234 (2005).

The Instrument of Combination filed in the Register of Deeds on 10 November 2003 by the Bissettes undisputedly reduced the size of Lot 8 from 2.352 acres of land to 1.211 acres of land. As such, this action clearly “reduce[d] the total area of [Lot 8] as shown on the maps and plats” incorporated in the Declaration. This assignment of error is overruled.

[2] The Bissettes next argue that the assignment of rights of the Declaration and the subsequent bankruptcy of Byron renders the covenant unenforceable. This argument is not properly before this Court and is otherwise without merit.

“This Court has long held that issues and theories of a case not raised below will not be considered on appeal[.]” *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) (citing *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (where theory argued on appeal was not raised before the trial court, “the law does not permit parties to swap horses between courts in order to get a better mount” before an appellate court)).

Here, the Bissettes introduced evidence at trial showing that the original declarant assigned its interest in Moss Creek to Byron on 30 January 1990, and that Byron exited bankruptcy on 24 August 2005. The Bissettes then claimed in their amended July 2006 answer that

1. The Bissettes cite N.C. Gen. Stat. §§ 153A-335, 160A-376 (2007) and Guilford County, NC, Dev. Ordinance § 2-1.7 (2009).

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Byron quitclaimed its interest in Moss Creek to themselves personally, and that Byron had approved their recombination deed.² This maneuver, whatever legal effect it might have had on the common stock of the bankruptcy, did not answer the issue of how the assets (including the realty interests of Byron) were allocated in bankruptcy and whether these interests remained with Byron afterward. More importantly for our review, the Bissettes' argument that the recombination was ratified or approved is not the argument raised here, which is whether the bankruptcy of Byron voided the restrictive covenants.

Yet, even if this issue is properly before this Court, the Bissettes fail to cite any authority which supports their contention. The Bissettes cite *DeLaney v. Hart*, 198 N.C. 96, 150 S.E. 702 (1929) for the proposition that the bankruptcy of a declarant holding the ability to enforce deed restrictions will prohibit their future enforcement. However, *DeLaney* is factually distinct from this case, because in that case the Court found there was no general plan of development and that the covenants could therefore be enforced by no one. *DeLaney*, 198 N.C. at 97, 150 S.E. at 703. Here, there is clearly an extensive development plan bolstered by restrictive covenants, and the Bissettes' argument is without merit. This assignment of error is overruled.

Lastly, the Bissettes argue that even if the restrictive covenants were violated, their affirmative defenses of waiver, estoppel, and laches present issues of fact which preclude summary judgment. We disagree.

The Bissettes cite case law holding that: landowners in violation of restrictive covenants may not themselves enforce such covenants in equity;³ waiver, estoppel, or laches may provide a defense to the enforcement of a covenant unless the covenant is no longer valid;⁴ and no North Carolina superior court judge may overrule another.⁵ However, the Bissettes apply no facts from the record to the case law

2. The amended answer does not include the alleged approval by Byron in its exhibits. However, the record shows that Herbert B. Parks purported to assign Byron's interest in the Declaration on 13 October 2005, and that Mary Bissette approved the recombination on behalf of Byron on 1 November 2005.

3. *Rodgerson*, 27 N.C. App. 173, 218 S.E.2d 471.

4. *Medearis v. Trustees of Meyers Park Baptist Church*, 148 N.C. App. 1, 558 S.E.2d 199 (2001), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 190 (2002).

5. *Adams Creek Assocs. v. Davis*, 186 N.C. App. 512, 652 S.E.2d 677 (2007), *disc. review denied*, 362 N.C. 354, 662 S.E.2d 900 (2008).

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cited. Accordingly, this argument is deemed abandoned. N.C. R. App. P. 28(b)(6) (2009).

Fines, Costs, and Attorneys' Fees

[3] The Bissettes next argue that: (1) there was no violation of the restrictive covenants upon which to base the award of attorneys' fees, fines, and costs; and (2) no statutory bases exist to award attorneys' fees in this case. As previously discussed, the Bissettes' first contention has no merit; however, we reverse in part based on the second.

The first order filed by Judge Spivey on 29 December 2006 imposed attorneys' fees of \$60,016.07 "stemming from [the Bissettes'] violations of the restrictive covenants." In his second order, Judge Spivey awarded \$11,656.25 in attorneys' fees as sanctions in response to appellees' motion to dismiss under Rules 12 and 41 of the North Carolina Rules of Civil Procedure. On 12 June 2007, Judge Balog ordered the Bissettes to pay \$10,000 to plaintiffs for legal fees incurred by them in the contempt proceedings. None of the orders awarding fees cite the statutory authority upon which they are based.

With regard to the first award of \$60,026.07, our Supreme Court has held that a prevailing party may not recover attorneys' fees "[e]ven in the face of a carefully drafted contractual provision indemnifying a party for such attorneys' fees . . . *absent statutory authority therefor.*" *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814-15 (1980) (emphasis added). While appellees correctly contend that N.C. Gen. Stat. § 47F-1-101 *et seq.*, otherwise known as North Carolina's Planned Community Act ("PCA"), now provides a basis for an award of attorneys' fees, the PCA does not justify the trial court's order in this case.

In *McGinnis Point Owners Ass'n v. Joyner*, 135 N.C. App. 752, 522 S.E.2d 317 (1999), this Court noted that N.C. Gen. Stat. § 47F-3-120 authorizes the recovery of attorneys' fees in an action to enforce restrictive covenants brought pursuant to Chapter 47F. *McGinnis Point Owners*, 135 N.C. App. at 757, 522 S.E.2d at 321. At that time, N.C. Gen. Stat. § 47F-3-120 did not apply to planned communities created prior to February 1999 unless a community's declaration of covenants was amended to specifically incorporate Chapter 47. *Id.*

In 2005, several revisions were made to Chapter 47F, and N.C. Gen. Stat. § 47F-1-102 (2007) was revised to make N.C. Gen. Stat.

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§ 47F-3-120 applicable “to all planned communities created in this State on or after January 1, 1999[.]” N.C. Gen. Stat. § 47F-1-102; 2005 N.C. Sess. Laws ch. 214, § 1. This revision made section 47F-3-120 effective as to all claims commenced on or after 20 July 2005. 2005 N.C. Sess. Laws ch. 214, § 2.

In this case, Moss Creek was created in 1987, and the record does not show that the Declaration in this case has been amended to incorporate revised Chapter 47. Moreover, the Association commenced this action on 18 May 2005,⁶ and thus the PCA’s provisions allowing attorneys’ fees in actions to enforce the restrictive covenants do not apply in the absence of an express incorporation of Chapter 47F in the Declaration. As a result, the PCA provides no statutory basis for an award of attorneys’ fees to plaintiffs. We therefore reverse Judge Spivey’s 29 December 2006 award of \$60,026.07 in attorneys’ fees.

[4] In awarding \$11,656.25 in attorneys’ fees in his second order, the record shows that Judge Spivey was considering the award of attorneys’ fees as he was ruling on appellees’ motion to dismiss the Bissettes’ various counterclaims and defenses under Rules 12 and 41 of the North Carolina Rules of Civil Procedure. This included a ruling as to punitive damages.

N.C. Gen. Stat. § 1D-45 (2007) provides:

The court shall award reasonable attorneys’ fees, resulting from the defense against the punitive damages claim, against a claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious. The court shall award reasonable attorney fees against a defendant who asserts a defense in a punitive damages claim that the defendant knows or should have known to be frivolous or malicious.

Id. Therefore, since the trial court dismissed the Bissettes’ punitive damages claim under Rule 12, N.C. Gen. Stat. § 1D-45 supports this award of attorneys’ fees.

In their brief, the Bissettes make no argument regarding this award of fees other than stating that “there is simply no basis under any statute or Rule of Civil Procedure for such an award.” Under our appellate rules, it is the duty of appellate counsel to provide

6. Plaintiffs’ argument that the date of their amended complaint should be the date by which our Court measures the date the action commenced has no statutory basis. *See* N.C. Gen. Stat. § 1A-1, Rule 15(c) (2007).

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sufficient legal authority to this Court, and failure to do so will result in dismissal. N.C. R. App. P. 28(b)(6). Thus, because the Bissettes have failed to cite any legal authority whatsoever in support of their argument as to these attorneys' fees, we conclude this issue does not warrant appellate review. *Pritchett & Burch, PLLC v. Boyd*, 169 N.C. App. 118, 123, 609 S.E.2d 439, 443 (assignment of error abandoned for failure to cite authority in support of argument), *disc. review dismissed*, 359 N.C. 635, 616 S.E.2d 543 (2005); *Hatcher v. Harrah's N.C. Casino Co., LLC*, 169 N.C. App. 151, 159, 610 S.E.2d 210, 214-15 (2005).

[5] The Bissettes lastly challenge the award of attorneys' fees under Judge Balog's 12 June 2007 order for contempt in failing to pay fees and costs in Judge Spivey's prior orders. As a general rule, "[a] North Carolina court has no authority to award damages to a private party in a contempt proceeding[.]" because "[c]ontempt is a wrong against the state, and moneys collected . . . go to the state alone." *Glesner v. Dembrosky*, 73 N.C. App. 594, 599, 327 S.E.2d 60, 63 (1985). Courts can award attorneys' fees in contempt matters only when specifically authorized by statute. *Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000). However, this Court has acknowledged certain exceptions to this general rule such as child support and equitable distribution actions. *Blair v. Blair*, 8 N.C. App. 61, 173 S.E.2d 513 (1970) (awarding attorneys' fees in a contempt action to enforce child support); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990) (awarding attorneys' fees in a contempt action to enforce equitable distribution award), *aff'd*, 328 N.C. 729, 403 S.E.2d 307 (1991).

Appellees' current action did not arise in either of these contexts; and the cases cited by appellees⁷ in defense of the fee award support our case law that outside of the family law field, statutory authority is required for enforcement of contempt. Therefore, we reverse the \$10,000 award in attorneys' fees to appellees incurred by enforcing the trial court's contempt orders.

Breach of Fiduciary Duty Claim

[6] The Bissettes finally argue that the trial court erred in dismissing their claim for breach of fiduciary duty because they substantially complied in providing a more definite statement of their claim.

7. *Watson v. Watson*, 187 N.C. App. 55, 652 S.E.2d 310 (2007), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008); *Baxley v. Jackson*, 179 N.C. App. 635, 634 S.E.2d 905, *disc. review denied*, 360 N.C. 644, 638 S.E.2d 462 (2006).

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The trial court granted summary judgment to appellees on the Bissettes' breach of fiduciary duty claim on 8 March 2007. In its order, the trial court found

that the allegations set forth within the pleading at issue *were not sufficient to show a right to relief*, do not provide the specificity and detail required[,], nor provide compliance with the previously entered Order of [Judge Spivey.]

(Emphasis added.) The Bissettes here do not challenge the trial court's finding that their pleading was insufficient "to show a right to relief." Accordingly, this finding is binding on review in this Court. *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) ("Where findings of fact are challenged on appeal, each contested finding of fact must be separately assigned as error, and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding."). This assignment of error is overruled.

Based on the foregoing, we reverse the trial court's award of \$60,026.07 in attorneys' fees stemming from the violations of the restrictive covenants, reverse the award of \$10,000.00 for attorneys' fees enforcing the trial court's contempt orders, and otherwise affirm the orders of the trial court.

Affirmed in part and reversed in part.

Judges WYNN and JACKSON concur.

VIKTORIA KING, A MINOR, BY AND THROUGH HER PARENT, REVONDIA HARVEY-BARROW,
PLAINTIFF-APPELLANT v. BEAUFORT COUNTY BOARD OF EDUCATION; JEFFREY
MOSS, SUPERINTENDENT, BEAUFORT COUNTY SCHOOLS, IN HIS OFFICIAL CAPACITY
DEFENDANTS-APPELLEES

No. COA08-1038

(Filed 20 October 2009)

**1. Constitutional Law— right to free public education—
access to alternative education**

The trial court did not err by allowing defendants' motion to dismiss a declaratory judgment action under N.C.G.S. § 1A-1, Rule 12(b)(6) for defendants' alleged failure to provide an alter-

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native education program for a student given a long-term suspension because the disposition of students who have been expelled or given long-term suspensions is a decision involving the administration of the public schools which is best left to the Legislature.

2. Parties— failure to join necessary party—improper dismissal

The trial court's dismissal for failure to join a necessary party under N.C.G.S. § 1A-1, Rule 12(b)(7) was erroneous because: (1) in the absence of a proper motion by a competent person, the defect should be corrected by an *ex mero motu* ruling of the court; and (2) assuming *arguendo* that the State of North Carolina was a necessary party to this action, the proper remedy was to join the State rather than dismiss the action.

3. Administrative Law— judicial review—subject matter jurisdiction

The trial court did not err by denying defendants' motion to dismiss for lack of subject matter jurisdiction based on plaintiff's alleged failure to exhaust administrative remedies prior to filing this declaratory judgment action because plaintiff was challenging the constitutionality of her exclusion from alternative education during her period of suspension rather than a review of the actual suspension, and under these circumstances, plaintiff was without an adequate administrative remedy.

Judge GEER dissenting.

Appeal by plaintiff and cross-appeal by defendants from order entered on 16 May 2008 by Judge William C. Griffin, Jr., in Beaufort County Superior Court. Heard in the Court of Appeals 11 February 2009.

Advocates for Children's Services, Legal Aid of North Carolina, Inc., by Erwin Byrd, Keith Howard, and Lewis Pitts; and Children's Law Clinic, Duke University School of Law, by Jane Wettach, for plaintiff-appellant.

Tharrington Smith, L.L.P., by Curtis H. Allen III and Robert M. Kennedy, Jr., for defendant-appellees.

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Roberts & Stevens, P.A., by Christopher Z. Campbell and K. Dean Shatley, II, on behalf of North Carolina School Boards Association; and North Carolina School Boards Association, by Allison B. Schafer, amicus curae.

CALABRIA, Judge.

Viktoria King (“plaintiff”) was a tenth grade student at Southside High School in Beaufort County during the 2007-2008 school year. On 18 January 2008, a fight involving numerous students occurred, and plaintiff was one of the students involved. As a result, plaintiff was subsequently suspended for ten days, beginning 24 January 2008. Additionally, the principal of Southside High School recommended to Beaufort County School Superintendent Jeffrey Moss (“the superintendent”) a long-term suspension for plaintiff for the remainder of the school year. The superintendent followed this recommendation and suspended plaintiff for the remainder of the 2007-2008 school year.

On 20 February 2008, plaintiff filed an action seeking declaratory relief from the Beaufort County Superior Court, alleging the Beaufort County Board of Education and the superintendent (“defendants”) violated her constitutional rights. Specifically, plaintiff alleged defendants’ failure to provide an alternative education program for a student given a long-term suspension violated her constitutional right to a free public education. Plaintiff also filed a Motion for Temporary Restraining Order and Preliminary Injunction asking the trial court to order defendants to provide plaintiff with access to educational services during her period of suspension. This motion was denied and the trial court dismissed plaintiff’s complaint, pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and 12(b)(7) (2007) of the North Carolina Rules of Civil Procedure. However, the trial court refused to dismiss plaintiff’s complaint pursuant to Rule 12(b)(1). Plaintiff appeals the dismissal of her complaint. Defendants cross-appeal the court’s denial of their Motion to Dismiss pursuant to Rule 12(b)(1).

I. Dismissal pursuant to Rule 12(b)(6)

[1] Plaintiff argues that the trial court erred by allowing defendants’ Motion to Dismiss for failing to state a claim for which relief can be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). We disagree.

On a Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is “whether, as a matter of law, the allegations of the complaint, treated as true,

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are sufficient to state a claim upon which relief may be granted under some legal theory[.]” *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)(citation omitted). The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief. *See Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987). A superior court’s decision to dismiss a complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is reviewed *de novo* by this Court. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

Plaintiff argues that the trial court erred by relying on *In re Jackson*, 84 N.C. App. 167, 352 S.E.2d 449 (1987) in assessing her claims. Plaintiff believes that *Jackson* is no longer viable after the decisions of the North Carolina Supreme Court in *Leandro v. State of North Carolina*, 346 N.C. 336, 488 S.E.2d 249 (1997) and *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004). Both *Leandro* and *Hoke* addressed the qualitative aspects of a public education, determining that N.C. Const. art. I, § 15 and N.C. Const. art. IX, § 2 “combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools.” *Leandro*, 346 N.C. at 347, 488 S.E.2d at 255. Specifically, the *Leandro* and *Hoke* Courts were attempting to remedy significant funding disparities between school districts statewide that were depriving students in poorer districts the opportunity to receive quality education. *Leandro* set out the essential pieces of what it considered to be a sound basic education, which is

one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student’s community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

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Id. The problems addressed in these cases were limited to the quality of education in the context of school financing and did not address in any way the subject of school discipline.

Neither the *Leandro* nor the *Hoke* decision provides any guidance on how the fundamental right for an opportunity to receive a sound basic education applies in the context of student discipline. The last pronouncement specifically on the issue was by this Court in *Jackson*. “Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same Court is bound by that precedent, unless it has been overturned by a higher court.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). *Jackson* specifically dealt with the issue of long term student suspensions without access to alternative education, and found the arrangement to be acceptable. “Reasonable regulations punishable by suspension do not deny the right to an education but rather deny the right to engage in the prohibited behavior.” *Jackson*, 84 N.C. App. at 176, 352 S.E.2d at 455. The Court went on to say:

A student’s right to an education may be constitutionally denied when outweighed by the school’s interest in protecting other students, teachers, and school property, and in preventing the disruption of the educational system. As a general rule, a student may be constitutionally suspended or expelled for misconduct whenever the conduct is of a type the school may legitimately prohibit, and procedural due process is provided.

Id. This pronouncement applies directly to the plaintiff’s situation and justifies the decision to suspend her until the 2008-2009 school year.

The disposition of students who have been expelled or suspended long term is ultimately a decision involving the administration of the public schools, a decision which is best left to the Legislature. As the Court noted in *Jackson*,

[A] juvenile court judge does not have the power to legislate or to force school boards to do what he thinks they should do. Our legislature did not impose upon the public schools or other agency a legal obligation to provide an alternative forum for suspended students, and a court may not judicially create the obligation.

Id. at 178, 352 S.E.2d at 456. This statement is echoed in *Leandro*. “[T]he administration of the public schools of the state is best left to the legislative and executive branches of government.” *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261. Since the decision in *Jackson*

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the Legislature has decreed that “[e]ach local board of education shall establish at least one alternative learning program and shall adopt guidelines for assigning students to alternative learning programs.” N.C. Gen. Stat. § 115C-47(32a) (2007). These guidelines include “strategies for providing alternative learning programs, when feasible and appropriate, for students who are subject to long term suspension or expulsion.” *Id.* The Legislature has clearly considered the issue of alternative education for students who are either suspended long term or expelled, and it did not choose to make access to alternative education mandatory. We have no authority to question this judgment.

There is nothing in either *Leandro* or *Hoke* that indicates that the Supreme Court intended to disturb precedent or change the standard of review regarding school discipline. Plaintiff’s claims do not address the qualitative aspect of her education, as in *Leandro*, but deal instead with her right to access the public education system. Without a clear indication from a higher court or the Legislature that *Jackson* is no longer good law, we are bound by precedent. The trial court, relying on *Jackson*, properly dismissed plaintiff’s complaint under Rule 12(b)(6) for failure to state a claim on which relief can be granted. Because dismissal was proper on these grounds, we need not consider plaintiff’s additional Rule 12(b)(6) claims.

II. Dismissal pursuant to Rule 12(b)(7)

[2] Although it is not relevant to our disposition of this case, we note that the trial judge’s dismissal for failure to join a necessary party pursuant to Rule 12(b)(7) was error. A trial court is in error when it dismisses a case because a necessary party has not been joined. *White v. Pate*, 308 N.C. 759, 764, 304 S.E.2d 199, 202 (1983). When the absence of a necessary party is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action. *Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978). “[I]n the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the court.” *Id.* Assuming, *arguendo*, that the State of North Carolina was a necessary party to this action, the proper remedy was to join the State rather than dismiss the action.

III. Dismissal pursuant to Rule 12(b)(1)

[3] Defendants, in their only cross-assignment of error, argue that the trial court erred by denying their motion to dismiss based upon a lack of subject matter jurisdiction. We disagree.

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Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. *Harris v. Pembaur*, 84 N.C. App. 666, 667-68, 353 S.E.2d 673, 675 (1987). The standard of review on a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction is *de novo*. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

Defendants argue the trial court lacked subject matter jurisdiction over plaintiff because she failed to utilize the administrative remedies available to her before instituting her action. “[W]here the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts.” *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). However, when the only remedies available from the agency are shown to be inadequate, a party may seek redress in a court without exhausting administrative remedies. *Huang v. N.C. State University*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 815-16 (1992).

Defendants allege that plaintiff failed to take advantage of available appeals pursuant to N.C. Gen. Stat. § 115C-391(e) before filing her action. This statute provides that a student suspended for more than ten days may appeal that suspension to the local school board. If the school board upholds the suspension, the student may then seek review in the superior court. N.C. Gen. Stat. § 115C-391(e) (2007). In the instant case, plaintiff filed her action in superior court while the appeal of her suspension before the school board was still pending.

The timing of the filing of plaintiff’s action is immaterial because the issues raised by the action could not be addressed by the school board as part of the appeals process. Plaintiff was challenging the constitutionality of her exclusion from alternative education during her period of suspension; she was not seeking review of the actual suspension. The statute would only allow review of the latter, while no administrative procedure would permit review of the former. Under these circumstances, plaintiff was without an adequate administrative remedy and her claim was properly before the superior court. Defendants’ cross-assignment of error is overruled.

Affirmed.

Judge ELMORE concurs.

Judge GEER dissents in a separate opinion.

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GEER, Judge, dissenting.

I would hold that *In re Jackson*, 84 N.C. App. 167, 352 S.E.2d 449 (1987), is no longer controlling authority following our Supreme Court's decision in *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997). I believe that *Leandro* and appellate decisions applying *Leandro* establish that the state constitutional right to education is a fundamental right. Because plaintiff has alleged that defendants' actions have completely denied her this fundamental right and because defendants bear the burden of establishing that their actions were necessary to promote a compelling governmental interest—a burden not negated by any allegations in the complaint—I would hold that the trial court improperly dismissed the complaint under Rule 12(b)(6).

The North Carolina constitution explicitly guarantees the right to a free public education: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. In *Leandro*, our Supreme Court concluded that "the intent of the framers [of the North Carolina constitution] was that *every child have a fundamental right to a sound basic education* which would prepare the child to participate fully in society as it existed in his or her lifetime." 346 N.C. at 348, 488 S.E.2d at 255 (emphasis added). The Court then confirmed that when a plaintiff presents competent evidence that a defendant is "denying children of the state a sound basic education, a denial of a fundamental right will have been established." *Id.* at 357, 488 S.E.2d at 261. This year, the Supreme Court reconfirmed the fundamental nature of this right in *Wake Cares, Inc. v. Wake County Bd. of Educ.*, 363 N.C. 165, 172, 675 S.E.2d 345, 350 (2009).

The majority suggests that *Leandro's* fundamental right analysis does not apply outside of the school financing context. Nothing in *Leandro*, however, suggests such a limitation. Moreover, in *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 620, 599 S.E.2d 365, 379 (2004), the Court concluded that "the constitutional right articulated in *Leandro* is vested in them all[.]" referring to all children in North Carolina regardless of age or the need of the particular child. It seems unlikely to me that the Supreme Court intended that a right "vested in" all North Carolina children would actually refer only to school financing. Finally, *Wake Cares* did not involve school financing, but rather the school calendar, and yet the Supreme Court again recited the fundamental nature of the right to education in North Carolina.

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The Supreme Court explained in *Leandro* that once children present evidence that they are being denied a sound basic education, the burden shifts—as it does with all fundamental rights—to the defendants “to establish that their actions denying this fundamental right are ‘necessary to promote a compelling governmental interest.’” 346 N.C. at 357, 488 S.E.2d at 261 (quoting *Town of Beech Mountain v. County of Watauga*, 324 N.C. 409, 412, 378 S.E.2d 780, 782, *cert. denied*, 493 U.S. 954, 107 L. Ed. 2d 351, 110 S. Ct. 365 (1989)). According to the Court, “[i]f defendants are unable to do so, it will then be the duty of the court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong while minimizing the encroachment upon the other branches of government.” *Id.*

In contrast to *Leandro*, *Jackson* states that “[a] student’s right to an education may be constitutionally denied when outweighed by the school’s interest in protecting other students, teachers, and school property, and in preventing the disruption of the educational system.” *Jackson*, 84 N.C. App. at 176, 352 S.E.2d at 455. The Court added that “[r]easonable regulations punishable by suspension do not deny the right to an education” *Id.* (emphasis added). This general weighing approach permitting reasonable regulations to outweigh the right to education more closely resembles a rational basis test than the scrutiny applicable to a fundamental right that was mandated by *Leandro*. See Joseph W. Goodman, *Leandro v. State and the Constitutional Limitation on School Suspensions and Expulsions in North Carolina*, 83 N.C.L. Rev. 1507 (Sept. 2005) (observing that the Court in *Jackson* “seemingly applied a lower rational basis standard”). Indeed, defendants acknowledge that *Jackson* applied the lesser rational basis test.

Because *Jackson* used a rational basis test to evaluate the deprivation of education resulting from a suspension, I do not believe its holding can control in this case. Instead, we should be applying the strict scrutiny standard set out in *Leandro*. Here, plaintiff alleged that because she was given a long-term suspension, was not provided an alternative education program, and was not given access to other public educational services, she has been completely denied access to a public education. She has further alleged that defendants cannot demonstrate that this action was necessary to promote a compelling governmental interest “because it was not necessary to completely deprive [plaintiff] of all educational services during her period of long-term suspension, even if it was necessary to remove her from [her high school] for the remainder of the year.”

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I would hold that these allegations are sufficient to state a claim for violation of plaintiff's constitutional right to an education.¹ Even if defendants' long-term suspension of plaintiff for fighting could be deemed justified under the constitution, plaintiff's allegations are still sufficient to draw into question whether defendants' decision to completely bar plaintiff from a public school education for an extended period was "narrowly tailored" to serve its compelling governmental interest regarding school discipline. *See Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002) ("Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest.").

Defendants should have to show that in order to meet their compelling interest, it was not only necessary to suspend plaintiff from her high school, but also to preclude her from obtaining her education through an alternative school program or access to other public educational services. I would, therefore, hold that plaintiff has stated a claim for violation of her constitutional right to a sound, basic education. *See Copper ex rel. Copper v. Denlinger*, 193 N.C. App. 249, 286, 667 S.E.2d 470, 494 (2008) (observing that School Board may be able to demonstrate at summary judgment stage that no constitutional violation had occurred, but that "[a]t the Rule 12(b)(6) stage, however, the Board has not established that plaintiffs have failed to state a claim for relief"), *appeal dismissed in part and disc. review granted*, 363 N.C. 124, 672 S.E.2d 686 (2009).

The majority, however, asserts that "[t]he disposition of students who have been expelled or suspended long term is ultimately a decision involving the administration of the public schools, a decision which is best left to the Legislature." In *Leandro*, the Supreme Court soundly rejected the defendants' claim that "educational adequacy claims" should not be decided by the courts: "When a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits." 346 N.C. at 345, 488 S.E.2d at 253. Later in its opinion, the Court noted the need to give "every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various

1. I simply cannot accept the trial court's determination that a one-semester suspension is only a "temporary" halt of educational services that does not implicate *Leandro*. While for adults, five months might fly by, five months in the education of a child is not a minor deprivation.

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school districts of the state a sound basic education[,]” but stressed that “the judicial branch has its duty under the North Carolina Constitution.” *Id.* at 357, 488 S.E.2d at 261. Since plaintiff has sufficiently alleged that her constitutional right to education has been denied, I believe it is the duty of the courts to address that issue. We do not defer to the other branches of government or to local governments in matters involving the constitution.

The trial court, however, further concluded that no constitutional claim was available because an adequate alternative state remedy exists. *See Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (“Therefore, in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution.”), *cert. denied sub nom. Durham v. Corum*, 506 U.S. 985, 121 L. Ed. 2d 431, 113 S. Ct. 493 (1992). The trial court pointed to a student’s right to appeal a suspension under N.C. Gen. Stat. § 115C-391(e) (2007). Essentially, plaintiff’s claim is that she must be provided with alternative education opportunities even if she is removed from her high school as a result of a long-term suspension. I agree with the majority opinion that an administrative appeal of her long-term suspension would not provide plaintiff with an opportunity to present this claim or obtain the desired relief. *See Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009) (holding that adequate alternative state remedy “must provide the possibility of relief under the circumstances”). Just as the majority opinion concludes that plaintiff’s claim was not precluded by a failure to exhaust her administrative remedies, I would hold that she had no adequate alternative state remedy that would preclude her constitutional claim.

Consequently, I would hold that plaintiff has sufficiently alleged a violation of her fundamental right to education. Since no adequate alternative state remedy exists, she is entitled to pursue her constitutional claim in the courts. I concur in the majority’s holding that defendants were not entitled to a dismissal of plaintiff’s claim under Rules 12(b)(1) and 12(b)(7). I would, therefore, hold that the trial court erred in dismissing plaintiff’s complaint and must respectfully dissent.

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CHRISTOPHER A. MUSI AND PAMELA SABALOS, PLAINTIFFS v. THE TOWN OF
SHALLOTTE AND THE TOWN OF SHALLOTTE BOARD OF ALDERMEN,
DEFENDANTS

No. COA08-1522

(Filed 20 October 2009)

1. Declaratory Judgments— standing—allegation of special damages not required

Plaintiffs had standing to file a declaratory judgment action challenging defendants' rezoning of property because the Declaratory Judgment Act does not require a party seeking relief to be an "aggrieved" person or to otherwise allege special damages.

2. Zoning— rezoning—spot zoning

A rezoning was not spot zoning where the property did not have a single owner and was not surrounded by a uniformly zoned area. The question of whether it was illegal spot zoning was not reached.

3. Zoning— rezoning—range of permitted uses

Plaintiffs failed to establish that the Board of Aldermen did not conduct the proper assessment of the range of permitted uses in the pertinent rezoned areas, and thus the rezoning was not void on this basis.

4. Evidence— exclusion of exhibits—summary judgment hearing

The trial court did not abuse its discretion by excluding certain exhibits from evidence at a summary judgment hearing in a declaratory judgment action challenging rezoning.

Appeal by Plaintiffs from judgment entered 9 June 2008 by Judge Thomas H. Lock in Brunswick County Superior Court. Heard in the Court of Appeals 18 August 2009.

The Brough Law Firm, by Thomas C. Morphis, Jr., for Plaintiffs.

Jess, Isenberg & Thompson, by Laura E. Thompson, for Defendants.

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BEASLEY, Judge.

Plaintiffs (Christopher Musi and Pamela Sabalos) appeal the denial of their summary judgment motion and entry of summary judgment in favor of Defendant, Town of Shallotte. We affirm.

This appeal arises from a zoning decision of the Board of Alderman of the Town of Shallotte, in Brunswick County, North Carolina. The property that was rezoned (the subject property) consists of fifteen separate tracts with six different owners. The subject property is located on the west side of the Shallotte River, between the Town of Shallotte and the Atlantic Ocean, each a little over a mile away. In 2006 the subject property was subject to the zoning authority of Brunswick County, and had an R-7500 zoning designation.

In June 2006 owners of the subject property applied to the Town of Shallotte for satellite annexation and rezoning under several town zoning categories. The Town of Shallotte Planning Board voted to recommend to the Board of Aldermen that the application be denied. In September 2006 the applicants withdrew their request and filed a second application, which was also withdrawn before it was presented to the Board of Aldermen for consideration.

In October 2006 the owners and agents for the subject property submitted a third application for satellite annexation and rezoning by the Town of Shallotte. The zoning designations requested by the applicants permit a higher density of housing units than the Brunswick County R-7500 zoning to which the applicants were then subject. After consideration of the request at its November 2006 meeting, the Planning Board voted to recommend that the Board of Aldermen approve this application. On 6 March the Town of Shallotte Board of Aldermen conducted a public hearing to consider the application and voted to annex the subject property and to rezone it as requested in the application.

On 2 May 2007 Plaintiffs filed a Declaratory Judgment action against the Town of Shallotte and Shallotte's Board of Aldermen. Plaintiffs sought a declaration that the rezoning was invalid, but did not challenge the Board's annexation of the subject property. The parties each moved for summary judgment, and a hearing was conducted on 13 May 2008. On 9 June 2008 the trial court granted summary judgment in favor of Defendants, from which order Plaintiffs appealed to this Court. Plaintiffs have dismissed their claims against the Town of Shallotte Board of Aldermen, which is not a party to this appeal.

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Standard of Review

Plaintiffs appeal from the trial court's entry of summary judgment. Summary judgment is properly entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). On appeal, "[w]e review a trial court's order granting or denying summary judgment de novo. 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (other citations omitted)).

The present case was appropriate for entry of a summary judgment order, because it presents issues of law rather than fact:

Each party based its claim upon the same sequence of events[, and] . . . [n]either party has challenged the accuracy or authenticity of the documents establishing the occurrence of these events. Although the parties disagree on the legal significance of the established facts, the facts themselves are not in dispute. Consequently, we conclude that there is no genuine issue as to any material fact surrounding the trial court's summary judgment order.

Adams v. Jefferson-Pilot Life Ins. Co., 148 N.C. App. 356, 359, 558 S.E.2d 504, 507 (2002) (internal quotations omitted). We next determine whether the trial court properly granted summary judgment for Defendants.

[1] Preliminarily, we address the issue of standing. Defendants argue that Plaintiffs lacked standing to challenge the validity of the Defendants' rezoning.

Standing "refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002) (citations omitted). "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). "Standing is a question of law which this Court reviews *de novo*." *Cook v. Union Cty. Zoning Bd. of Adjust.*, 185 N.C. App. 582, 588, 649 S.E.2d 458, 464 (2007) (citation omitted).

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Defendants argue that, for Plaintiffs to have standing to file a declaratory judgment action challenging the rezoning, they must allege and prove that the rezoning caused them special damages. “[S]pecial damage[s] are defined as a reduction in the value of his [petitioner’s] own property.” *Sarda v. City/Cty. of Durham Bd. of Adjust.*, 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003) (internal quotations and citations omitted).

This Court previously has held:

A party has standing to challenge a zoning ordinance in an action for declaratory judgment only when it “has a specific personal and legal interest in the subject matter affected by the zoning ordinance[.]” The standing requirement for a declaratory judgment action is therefore similar to the requirement that a party seeking review of a municipal decision by writ of *certiorari* suffer damages “distinct from the rest of the community.” When a party seeks review by writ of *certiorari*, however, our courts have imposed an additional requirement that the party allege special damages in its complaint. This requirement arises from [certain statutes] which allow only “aggrieved” persons to seek review by writ of *certiorari*. In contrast, the Declaratory Judgment Act . . . does not require a party seeking relief be an “aggrieved” person or to otherwise allege special damages[.] [N.C. Gen. Stat. § 1-254 (2007), and] . . . we hold it is not required.

Village Creek Prop. Owners’ Ass’n, Inc. v. Town of Edenton, 135 N.C. App. 482, 485-86, 520 S.E.2d 793, 795-96 (1999) (quoting *Taylor v. City of Raleigh*, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976), and *Heery v. Zoning Board of Adjustment*, 61 N.C. App. 612, 614, 300 S.E.2d 869, 870 (1983)) (footnotes omitted and other citations omitted). We find *Village Creek* applicable to the facts of this case, and hold that Plaintiffs had standing to challenge Defendants’ rezoning of the subject property.

[2] Plaintiffs argue first that Defendants’ rezoning “is illegal spot zoning and is, therefore, void.” Accordingly, we must determine whether the rezoning at issue constituted spot zoning:

Spot zoning is defined, in pertinent part, as a zoning ordinance or amendment that “singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to . . . relieve the small tract from restrictions to which the rest of the area is subjected.”

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Good Neighbors of S. Davidson v. Town of Denton, 355 N.C. 254, 257, 559 S.E.2d 768, 771 (2002) (quoting *Blades v. City of Raleigh*, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1972)). “An essential element of spot zoning is a small tract of land owned by a single person and surrounded by a much larger area uniformly zoned.” *Covington v. Town of Apex*, 108 N.C. App. 231, 237, 423 S.E.2d 537, 540 (1992). We conclude that the subject property meets neither of these criteria for spot zoning.

The subject property does not have a common owner, but is comprised of fifteen (15) parcels, with six (6) owners. Plaintiffs allege that “a rezoning of property owned by more than one person can still constitute spot zoning.” In support of this proposition, Plaintiffs cite three cases. Two of these, *Alderman v. Chatham County*, 89 N.C. App. 610, 366 S.E.2d 885 (1988); and *Lathan v. Bd. of Commissioners*, 47 N.C. App. 357, 267 S.E.2d 30 (1980), involve the rezoning of property with a common owner, and thus shed no light on this issue. The third case cited by Plaintiffs is *Budd v. Davie County*, 116 N.C. App. 168, 447 S.E.2d 449 (1994), which addressed rezoning of (1) a tract of land owned by one person and, (2) a “strip of land” running from the tract, and owned by that person’s son. We do not find *Budd* persuasive, for several reasons.

Firstly, *Budd’s* holding is internally inconsistent. After quoting the same definition of spot zoning given above, and even noting that an “essential element of spot zoning is a small tract of land owned by a single person”, the Court then holds that the rezoning in question, involving property with two different owners, was spot zoning.

Additionally, in *Good Neighbors*, a Supreme Court of North Carolina case decided after *Budd*, the Court reiterates the definition in *Blades* and *Chrismon*, including the requirement that the rezoning be of a parcel with one owner. To the extent that *Good Neighbors* conflicts with *Budd*, we are bound to follow *Good Neighbors*.

The judicial policy of *stare decisis* is followed by the courts of this state. Under this doctrine, “[t]he determination of a point of law by a court will generally be followed by a court of the same or lower rank[.]” . . . Moreover, this Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions “until otherwise ordered by the Supreme Court.”

Dunn v. Pate, 106 N.C. App. 56, 60, 415 S.E.2d 102, 104 (1992), *rev’d on other grounds by Dunn v. Pate*, 334 N.C. 115, 431 S.E.2d 178

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(1993) (quoting 20 Am. Jur. 2d *Courts* § 183 (1965), and *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985)). Consequently, this Court is bound to adhere to the rule set out in *Good Neighbors* and other Supreme Court of North Carolina cases.

Plaintiffs acknowledge that the subject property has multiple owners, but assert that the rezoning can properly be analyzed as spot zoning, because (1) the owners of most of the tracts are members of the same extended family, and (2) the owners of the tracts have a “common interest.” Plaintiffs cite no authority for these exceptions to the general definition and we find none.

We also conclude that the subject property is not “surrounded by a much larger area uniformly zoned,” as required by *Blades*, 280 N.C. at 549, 187 S.E.2d at 45, and subsequent cases citing *Blades*. There is no precise definition of the area to be analyzed to determine whether a rezoned property is surrounded by a “much larger area” of uniform zoning. In this case, Plaintiffs chose to focus on the area within a one-mile radius of the subject property, and submitted a map of the zoning designations in this area. The map reveals that the one mile area around the subject property includes several zoning categories, including Brunswick County R-6000 and R-7500, and Shallotte Town R-10, RA-15, and Commercial Waterfront.

Moreover, Plaintiffs do not articulate the reason for their choice of a one mile radius around the subject property, and we note that a significant part of this area consists of the waters of the Shallotte River. Examination of either a larger area around the subject property, or of the nearest mile of dry land reveals additional zoning designations.

In sum, the subject property was not the property of a single owner, and was not surrounded by a uniformly zoned area. We conclude that the rezoning did not constitute “spot zoning” as this term has been defined, and we do not reach the question of whether it was illegal spot zoning. This assignment of error is overruled.

[3] Plaintiffs also argue that “the Board of Aldermen failed to consider the suitability of the subject property for the entire range of uses permitted in the MF-10, RM-10 and R-10 zoning districts, and the rezoning is, therefore, void.” We disagree.

Re-zoning is considered a legislative act. Accordingly, zoning decisions are typically afforded great deference by reviewing courts and “[w]hen the most that can be said against such ordi-

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nances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere[.]” and in most circumstances, “will not substitute its judgment for that of the legislative body[.]”

Childress v. Yadkin Cty., 186 N.C. App. 30, 34, 650 S.E.2d 55, 59 (2007) (quoting *In re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938)) (other citation omitted). “ ‘A duly adopted rezoning ordinance is presumed to be valid and the burden is upon the plaintiff to establish its invalidity.’ ” *Kerik v. Davidson Cty.*, 145 N.C. App. 222, 231, 551 S.E.2d 186, 192 (2001) (quoting *Nelson v. City of Burlington*, 80 N.C. App. 285, 288, 341 S.E.2d 739, 741 (1986)). However, “when rezoning property from one general use district with fixed permitted uses to another general use district with fixed permitted uses, a city council must determine that the property is suitable for all uses permitted in the new general use district[.]” *Hall v. City of Durham*, 323 N.C. 293, 305, 372 S.E.2d 564, 572 (1988).

Plaintiffs argue that the Board of Aldermen voted to rezone the subject property without considering the various uses permitted by the zoning designation. Their position is based primarily on the fact that the request for rezoning was associated with a proposal to build multifamily condominiums. Plaintiffs assert that the Aldermen who voted in favor of the rezoning “believed that the Rezoning would result in high-density multi-family dwellings being built” in the rezoned area. Plaintiffs stress that the prospective developers “made no attempt to disguise their plans,” suggesting that it is improper for rezoning to be considered in the context of a specific request or development proposal. However, it seems probable that most rezoning matters arise from a specific request by a party who hopes to build a particular building or development. Plaintiffs articulate no reason that if the Aldermen anticipated that a certain development would likely follow rezoning, this expectation would be inconsistent with the Board’s consideration of other uses, in addition to the proposed development. Nor do Plaintiffs explain the reason proponents of rezoning should keep their proposals a secret or would be expected to “disguise” their plans.

We have examined the record and conclude that there is ample evidence that the Board of Aldermen gave adequate consideration to the possible uses under the rezoning. The subject property was Brunswick County land that was annexed by the Town of Shallotte. Accordingly, the town replaced the county zoning categories with Shallotte’s zoning designations. Rezoning allowed a greater density of

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housing, and it is undisputed that the issue of housing density was thoroughly addressed. However, most of the uses permitted by rezoning were already allowed by the previous Brunswick County zoning. Further, when the Aldermen were deposed, each one testified that he had considered the full range of permitted uses.

In *Parker*, 214 N.C. 51, 197 S.E. 706, the North Carolina Supreme Court discussed the courts' role in reviewing zoning ordinances, and stated, in part:

The courts will not invalidate zoning ordinances duly adopted by a municipality unless it clearly appears that in the adoption of such ordinances the action of the city officials "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."

Id. at 55, 197 S.E. 706 (quoting *Nectow v. Cambridge*, 277 U.S. 183, 187-88, 72 L. Ed. 842, 844 (1928) (internal citation omitted)). In the instant case, we conclude that Plaintiffs failed to establish that the Board of Aldermen did not conduct the proper assessment of the range of permitted uses in the rezoned areas, and that the rezoning is not void on this basis. This assignment of error is overruled.

[4] Finally, Plaintiffs argue that the trial court erred by excluding Exhibits BB and CC from the evidence at the summary judgment hearing. We disagree.

"We review the trial court's decision to exclude evidence for an abuse of discretion." *Media Network, Inc. v. Long Haymes Carr, Inc.*, — N.C. App. —, —, 678 S.E.2d 671, 687 (2009) (citing *Barham v. Hawk*, 165 N.C. App. 708, 721, 600 S.E.2d 1, 9 (2004). (2009)). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citations omitted).

The exhibits that Plaintiffs sought to include in the evidence consist of letters from citizens opposed to certain construction plans that had been proposed for the subject property. Plaintiffs appeal from the Board of Aldermen's rezoning at its March, 2007 meeting. It

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is undisputed that these letters were not made a part of the record at this meeting. Moreover, Plaintiffs failed to argue on appeal that exclusion of these letters affected the outcome of the summary judgment proceeding:

[E]ven assuming, arguendo, that this testimony was inadmissible, plaintiffs have not shown prejudice. “The burden is on the appellant not only to show error, but to show prejudicial error, *i.e.*, that a different result would have likely ensued had the error not occurred. G.S. § 1A-1, Rule 61 [(2007)].”

O’Mara v. Wake Forest Univ. Health Scis., 184 N.C. App. 428, 440, 646 S.E.2d 400, 407 (2007) (quoting *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983)). This assignment of error is overruled. We conclude that the court did not err by entering summary judgment for Defendants and that its order should be

Affirmed.

Judges WYNN and STROUD concur.

HIEN NGUYEN, MATTHEW BROWN, RYAN CHILDREY, ROMAIN WATKINS, AND DAVID GREGORY, PLAINTIFFS v. JAYCEON TAYLOR, ENGEL THEDFORD, MICHAEL KIMBREW, JOHN DOE A/K/A DJ SKEE, ANTHONY TORRES, BLACK WALL STREET RECORDS, LLC, BLACK WALL STREET PUBLISHING, LLC, BUNGALO RECORDS, INC., GENERAL GFX, GRIND MUSIC, INC., JUMP OFF FILMS, LIBERATION ENTERTAINMENT, INC., JOHN DOE #2, WWW.STOP-SNITCHIN-STOPLYIN.COM, UNIVERSAL HOME VIDEO, INC., AND YOUTUBE, INC., DEFENDANTS

No. COA08-1469

(Filed 20 October 2009)

Appeal and Error—interlocutory orders—multiple defamation claims from mall incident—possibility of inconsistent verdicts—substantial right not shown

Plaintiffs’ appeal was dismissed as interlocutory where multiple defamation claims were filed, some were dismissed, and plaintiffs did not show that they would be prejudiced by inconsistent verdicts in separate proceedings.

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Appeal by plaintiffs from order entered 5 August 2008 by Judge Richard W. Stone in Guilford County Superior Court. Heard in the Court of Appeals 20 May 2009.

Cranfill Sumner & Hartzog, LLP, by Dan M. Hartzog, for plaintiff-appellants.

Carruthers & Roth, P.A., by Norman F. Klick, Jr., Robert N. Young, and Kevin A. Rust, for defendant-appellees.

STEELMAN, Judge.

Where plaintiffs appeal an interlocutory order that does not contain a Rule 54(b) certification and fail to show a substantial right will be adversely affected if the order is not immediately reviewed, the appeal is dismissed.

I. Factual and Procedural Background

On 28 October 2005, Jayceon Taylor a/k/a the rap artist “The Game” (Taylor) was scheduled to perform a concert in Winston-Salem, North Carolina. Earlier that day, Taylor and his entourage visited the Four Seasons Mall in Greensboro. During this visit, a member of Taylor’s entourage carried a video camera and recorded the events that transpired while they were inside the mall. A mall security guard advised Taylor that filming inside the mall without permission from management was prohibited and requested that it cease immediately. Taylor refused to comply with the security guard’s request and was asked to leave the premises. Taylor refused and the Greensboro Police Department was contacted for assistance. Plaintiffs Romaine Watkins (Watkins), David Gregory (Gregory), and Matthew Brown (Brown), who were all police officers working off-duty at the mall, responded to the security guard’s call and repeatedly requested that Taylor and his entourage leave the premises. Taylor allegedly responded by making threatening comments and engaging in disorderly conduct. By that time, a large crowd had gathered and several people began shouting words of encouragement to Taylor.

Officers determined that there was probable cause to arrest Taylor for criminal trespass, communicating threats, and disorderly conduct. Watkins attempted to arrest Taylor, but he physically resisted. When members of his entourage refused to stay back and advanced towards the officers, pepper spray was deployed in the direction of the crowd and an “emergency ‘need assistance’ radio distress call” was placed. Additional officers, including plaintiffs

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Ryan Childrey (Childrey) and Hien Nguyen (Nguyen), arrived. Taylor was arrested and transported to the Guilford County Jail. Following his release on bail, Taylor made the following statement to a local reporter:

They thought I was Rodney King, man. You know what I'm saying? It was mistaken identity. They thought I was Rodney King. Once I told them I was The Game, they let me out the gate. Nah, but they really kicked our (censored). I would play the racial card, but I think we use that too much. But I don't know man. But the force against . . . We're here for a concert and I got arrested for signing autographs. Signing a little girl's autograph got me arrested in North Carolina. I gotta bring up a case against the Guilford Police Department. I gotta do it man. It's unfair, man. Their behavior's unfair. You saw the tape? You know what went on . . . I don't know man, you're gonna have to ask Officer Watkins exactly. Soon as I wake up in the morning, I'll be on the phone with my lawyers.

The altercation at the mall was also recorded on video tape by a member of Taylor's entourage. The footage appeared on a DVD, which was released in January 2006 under the name "Stop Snitchin' Stop Lyin'." The image of Officer Brown was placed on the back cover of the DVD, above the caption "Exclusive: The full 15 minute footage of The Game being wrongfully arrested in North Carolina." The DVD was advertised on the website www.stopsnitchinstoplyin.com. In a section of the website entitled "About the DVD" the following statement appeared: "Also DVD Includes the Following Bonus Features: Entire footage of Game being wrongfully arrested and brutalized by the Police in North Carolina." This footage also appeared on the website www.youtube.com.

On 30 October 2006, plaintiffs filed a complaint against defendants alleging seventeen separate claims. The first five claims were asserted solely against Taylor and included: (1) slander *per se*; (2) slander *per quod*; (3) libel *per se*; (4) libel; and (5) libel *per quod*. These causes of action were based upon Taylor's statement to the reporter after his release from jail.

Claims number six through fifteen and seventeen were asserted against Taylor, Engel Thedford, Michael Kimbrew, DJ Skee, Anthony Torres, Black Wall Street Records, LLC, Black Wall Street Publishing, LLC, Bungalo Records, Inc., General GFX, Grind Music, Inc., Jump Off Films, Liberation Entertainment, Inc., John Doe, www.stopsnitchinstoplyin.com, and Universal Home Video, Inc. Claims six,

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seven, and eight alleged libel *per se*, libel, and libel *per quod*, respectively, based upon the statement on the website www.stopsnitchin-stoplyin.com that Taylor was wrongfully arrested and brutalized by the police in North Carolina. The same causes of action were also asserted in claims nine, ten, and eleven based upon the statement found on the back cover of the DVD. Based upon the misleading editing of the video, plaintiffs asserted claims thirteen, fourteen, and fifteen also for libel *per se*, libel, and libel *per quod*. Claim twelve alleged wrongful appropriation of a likeness based on the use of plaintiffs' images on the video tape and Officer Brown's picture on the back cover of the DVD case. Claim sixteen alleged appropriation against Youtube, Inc. and claim seventeen alleged unfair and deceptive trade practices.

Although the complaint was filed on 30 October 2006, the record indicates that plaintiffs continued to attempt to effect service on defendants as late as March of 2008. The record before this Court is devoid of any evidence of service or responsive pleadings pertaining to defendants other than Taylor, Black Wall Street Publishing, LLC, Jump Off Films, and Black Wall Street Records, LLC. The record indicates that a default was entered against Black Wall Street Records, LLC.

On 22 June 2007, defendants Taylor, Black Wall Street Records, LLC, Black Wall Street Publishing, LLC, and Jump Off Films filed an answer, which denied the material allegations of plaintiffs' complaint and asserted several affirmative defenses. On 18 June 2008, defendants Taylor, Black Wall Street Publishing, LLC, and Jump Off Films filed a motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. On 5 August 2008, the trial court granted defendants' motion in part and denied it in part. The trial court dismissed with prejudice plaintiffs' claims one through seven, nine, and ten as to the moving defendants. The trial court also dismissed claims eight and eleven of plaintiffs Nguyen, Brown, and Gregory as to the moving defendants, but denied the motions as to plaintiffs Childrey and Watkins. The trial court denied the motions of the moving defendants as to claims thirteen, fourteen, and fifteen. In addition, the trial court dismissed with prejudice plaintiffs' claims six through eleven, thirteen, fourteen, and fifteen as to Black Wall Street Publishing, LLC based upon the applicable statute of limitations. The trial court's order does not address plaintiffs' claims twelve or seventeen for appropriation and unfair and deceptive trade practices. Plaintiffs appeal.

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II. Interlocutory Nature of Appeal

We first address defendants' motion to dismiss plaintiffs' appeal as interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *See Veazy v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). An interlocutory order is not immediately appealable except in two instances: (1) the trial court certifies that there is no just reason for delay pursuant to Rule 54(b) of the Rules of Civil Procedure and (2) the interlocutory order affects a substantial right which will be lost if the order is not reviewed before a final judgment is entered. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

In the instant case, the trial court did not certify its order as immediately appealable pursuant to Rule 54(b).¹ Therefore, the burden is on plaintiffs to establish that a substantial right will be lost unless the trial court's order is immediately reviewed. *Id.* at 380, 444 S.E.2d at 254. "[T]he 'substantial right' test . . . is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Blackwelder v. State Dept. of Human Resources*, 60 N.C. App. 331, 334, 299 S.E.2d 777, 780 (1983) (quotations omitted).

Plaintiffs argue that the trial court's order affects a substantial right based upon the possibility of inconsistent jury verdicts. It is well-established that before a substantial right is affected on this basis, it must be shown that the same factual issues are present in both trials and that plaintiffs will be prejudiced by the possibility that inconsistent verdicts may result. *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 426, 444 S.E.2d 694, 697 (1994). Avoiding separate trials on different issues does not affect a substantial right. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 7, 362 S.E.2d 812, 816 (1987).

Plaintiffs argue that the issues before this Court on appeal and the issues that remain in the trial court are all based upon the same operative facts and pertain to Taylor's arrest and the subsequent characterizations of the arrest. Therefore, plaintiffs contend that separate trials on the same issues could possibly produce inconsistent verdicts

1. Plaintiffs specifically requested a Rule 54(b) certification and Judge Stone declined to include it in his order.

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if we do not immediately review the trial court's order. However, a close review of plaintiffs' claims and the conduct upon which they are based reveals that plaintiffs' argument is misplaced.

In order to prove libel *per se* at trial, plaintiffs will have to show that the publication, "when considered alone without innuendo tends to subject one to ridicule, public hatred, contempt or disgrace, or tends to impeach one in his trade or profession." *Arnold v. Sharpe*, 296 N.C. 533, 537, 251 S.E.2d 452, 455 (1979).

The initial question for the court in reviewing a claim for libel *per se* is whether the publication is such as to be subject to only one interpretation. If the court determines that the publication is subject to only one interpretation, it then "is for the court to say whether that signification is defamatory." It is only after the court has decided that the answer to both of these questions is affirmative that such cases should be submitted to the jury on a theory of libel *per se*.

Renwick v. News and Observer, 310 N.C. 312, 318, 312 S.E.2d 405, 409 (internal quotation and citation omitted), *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984). The second type of libel is said to arise when the publication is capable of having both a defamatory meaning and a non-defamatory meaning. *Id.* at 316, 312 S.E.2d at 408. In such cases, "it is for the jury to determine which of the two was intended and so understood by those to whom it was addressed or by whom it was heard." *Wright v. Credit Co.*, 212 N.C. 87, 89, 192 S.E. 844, 845 (1937) (quotation omitted). The third type of libel, libel *per quod*, may be asserted when a publication is not obviously defamatory, but when considered in conjunction with innuendo, colloquium, and explanatory circumstances it becomes libelous. *Ellis v. Northern Star Co.*, 326 N.C. 219, 223, 388 S.E.2d 127, 130 (1990). "In publications which are libelous *per quod*, the innuendo and special damages must be alleged and proved." *Arnold*, 296 N.C. at 537, 251 S.E.2d at 455 (citation omitted).

The claims originally asserted by plaintiffs fall into seven broad categories: (1) claims against Taylor based upon his statement to the reporter following his release from jail; (2) claims based upon statements found on the website www.stopsnitchinstoplyin.com; (3) statements found on the back of the DVD case; (4) the misleading editing of the DVD; (5) appropriation of a likeness based upon the back of the DVD case; (6) appropriation of a likeness based upon the video found on Youtube, Inc.; and (7) unfair and deceptive trade practices.

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While plaintiffs are correct that all of these claims ultimately arise out of the incident at Four Seasons Mall in Greensboro, they are not correct in asserting that this creates a substantial right based upon the possibility of inconsistent verdicts and supports this Court's hearing of an interlocutory appeal.

What this Court must analyze is not the underlying factual events that occurred at Four Seasons Mall, but rather the statements describing the events that plaintiffs contend gives rise to their claims for libel and slander. We must then ascertain whether the trial court's dismissal of a portion of these claims creates a possibility of inconsistent verdicts.

Claims one through five were directed solely at Taylor. Whether Taylor's statements to the reporter following his release from jail are libelous or slanderous is an independent claim from those arising from the statements on the website, on the back of the DVD case, or the editing of the DVD. Each statement or writing must be evaluated separately to determine whether it is libelous or slanderous. The trial court's dismissal of claims one through five does not create a possibility of inconsistent verdicts as to any of the surviving claims.

Claims six, seven, and eight are based upon statements found on the website. The trial court dismissed claims six and seven as to the moving defendants and dismissed the libel *per quod* claims contained in claim eight of plaintiffs Nguyen, Brown, and Gregory. The libel *per quod* claims were not dismissed as to plaintiffs Childrey and Watkins. The dismissal of the libel *per se* and libel claims based upon the website has no bearing on the other claims not based on the website. To state a claim for libel *per quod*, a party must specifically allege and prove special damages as to each plaintiff.² See *Griffin v. Holden*, 180 N.C. App. 129, 138, 636 S.E.2d 298, 305 (2006) ("[S]pecial damages [are] those which do not necessarily result from the wrong, must be pleaded, and the facts giving rise to the special damages must be alleged so as to fairly inform the defendant of the scope of plaintiff's demand." (quotation omitted)); see also *Stanford v. Owens*, 46 N.C. App. 388, 398, 265 S.E.2d 617, 624 ("[S]pecial damages must be pleaded with sufficient particularity to put defendant on notice." (citations omitted)), disc. review denied, 301 N.C. 95 (1980). Proof of special damages is not required in claims of either libel *per se* or libel.

2. We note that plaintiffs failed to plead special damages with regard to Nguyen, Brown, and Gregory in claims eight and eleven. As a result, the trial court properly dismissed these claims as to these plaintiffs.

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The dismissal of claims six, seven, and a portion of claim eight does not create a possibility of inconsistent verdicts as to any of the surviving claims. Claims six and seven are limited to the website. Since libel *per quod* specifically requires the pleading of special damages, these claims are limited to the specific plaintiff and the dismissal as to one plaintiff does not create a possibility of inconsistent verdicts as to the surviving claims.

For the reasons discussed above as to claims six, seven, and eight, the dismissal of claims nine, ten, and a portion of claim eleven based upon statements on the DVD case does not create a possibility of inconsistent verdicts as to the surviving claims.

Plaintiffs' remaining claims involve the wrongful appropriation of a likeness, libel based upon the misleading editing of the video, appropriation by You Tube, Inc., and unfair and deceptive trade practices. These claims are separate and distinct having different elements than the dismissed libel claims. As to the remaining claims, the dismissal of the claims above does not create a possibility of inconsistent verdicts.

Although the facts involved in the claims remaining before the trial court may overlap with the facts involved in the claims that have been dismissed, plaintiffs have failed to show that they will be prejudiced by the possibility of inconsistent verdicts in two separate proceedings. Accordingly, plaintiffs have failed to establish that a substantial right will be lost unless the trial court's order is immediately reviewed. Plaintiffs' appeal is dismissed as interlocutory.

DISMISSED.

Judges GEER and JACKSON concur.

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[200 N.C. App. 395 (2009)]

JAMES ALBERT KEYES, PETITIONER v. NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION, RESPONDENT

No. COA08-1542

(Filed 20 October 2009)

1. Public Officers and Employees— dismissal—deference to agency's interpretation of terms

The superior court did not err in a state employee's dismissal for cause action by deferring to the Department of Transportation's interpretation of the terms "safety-sensitive" and "CDL related" job functions, and by concluding that petitioner employee's position fell within those definitions.

2. Public Officers and Employees— dismissal—findings of fact—sufficiency of evidence

Although petitioner in a dismissal for cause of a state employee case argued on appeal that three of the superior court's findings of fact were unsupported by the evidence, irrelevant, and immaterial to the pertinent issues, petitioner in his brief only specifically challenged a portion of one finding, and that finding was supported by competent evidence.

3. Public Officers and Employees— dismissal—refusal to take drug test—willfulness

The superior court erred by affirming the Personnel Commission's conclusion that petitioner employee's refusal to take a drug test was willful, and the case was remanded, where the administrative law judge never reached the issue of willfulness and petitioner did not have the opportunity to present evidence on that issue.

Appeal by Petitioner from order entered 5 August 2008 by Judge William C. Griffin Jr. in Superior Court, Beaufort County. Heard in the Court of Appeals 18 August 2009.

McCotter, Ashton & Smith, P.A., By Rudolph A. Ashton, III & Stephen A. Graves, P.A., for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for respondent.

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[200 N.C. App. 395 (2009)]

WYNN, Judge.

Petitioner James Albert Keyes appeals from a Superior Court order affirming the State Personnel Commission's decision to dismiss Petitioner James Albert Keyes for just cause. Upon review, we affirm in part, and remand for consideration of the issue of willfulness by the Administrative Law Judge.

The record tends to show that Keyes worked at DOT as a transportation worker, a position that required a commercial driver's license (CDL). On 14 October 2004, Keyes was assigned to work with supervisor Ronnie Whitley's crew as a "flagger." Shortly after arriving at work, Keyes received a phone call from his wife stating that the water heater at their home was leaking water. Thereafter, Keyes informed Whitley that he needed to go home to attend to the water heater situation. Whitley directed Keyes to his supervisor, Stan Paramore.

Upon telling Paramore of his need to go home immediately to attend to his water heater, Paramore informed Keyes that he had been selected for a random drug and alcohol test that morning. Paramore consulted with Woody Jarvis, the County Maintenance Engineer, and they informed Keyes that he had to take the random drug and alcohol test before leaving, but that he could go home after completing the test.¹ When Keyes insisted that he needed to leave immediately, Paramore and Jarvis advised him that failure to take the test could result in dismissal. Keyes chose to leave work immediately rather than wait to take the drug and alcohol test.

The next day, Keyes received notice of a pre-disciplinary conference, at which Keyes would have an opportunity to respond to a recommendation of dismissal for his refusal to take the drug and alcohol test. On 18 October 2004, Keyes attended the pre-disciplinary conference which resulted in a notice of dismissal being issued the next day. The dismissal notice cited the State Personnel Manual Section 9, stating, "The willful violation of known or written work rules' is unacceptable personal conduct for which disciplinary action may be imposed up to and including dismissal."

In response, Keyes filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings, contending that DOT violated his due process and equal treatment rights under the law when it demanded that he take the drug test "at a time when he was faced

1. The record indicates that the testing facility did not open until 8:00 AM and that testing could take "a couple of hours."

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with a family emergency that required his immediate attention.” In a prehearing statement, Keyes argued that he was discharged without just cause; his refusal was not willful because of a family emergency; and DOT “acted erroneously, capriciously and arbitrarily, when it failed to postpone or re-schedule said random test in violation of G.S. 126-35(a) and G.S. 150B-23.”

At the contested case hearing on 27 October 2005 before Administrative Law Judge Beecher R. Gray (“ALJ Gray”), DOT bore the burden of showing that it had just cause to terminate Keyes. After DOT presented its evidence, Keyes moved to dismiss on the ground that DOT failed to carry its burden of proof. Before Keyes presented any evidence, ALJ Gray granted the motion to dismiss on the ground that because Keyes was not performing a “safety sensitive” or “CDL-related” job function, DOT failed to show by a preponderance of the evidence that Keyes was subject to taking the drug and alcohol test under DOT’s Controlled Substance and Alcohol Misuse Policy and Procedure. ALJ Gray specifically concluded that he did not reach the issue of willfulness.

From that narrow order, DOT filed objections and proposed alternative Findings of Fact and Conclusions of Law with the State Personnel Commission, which considered the matter on 16 February 2006 and issued a decision in March 2006, rejecting ALJ Gray’s decision by concluding:

4. . . . Although the phrase “CDL related job functions” is not specifically defined in [DOT]’s policy, [DOT] is entitled to deference in its interpretation of its own regulations. It was reasonable for the [DOT]’s policy manager to interpret the phrase “CDL related job function” to include all employees whose job requires them to hold a CDL so that employees who are tested “immediately before, during or immediately after performing CDL related job functions” are those employees who are present for work and who perform CDL duties as part of their job description.

5. [DOT] did produce evidence that [Keyes] was directed to take a random drug and alcohol screening test on a day on which he was scheduled to be a [sic] work, performing the duties of a transportation worker. [DOT] produced evidence that the transportation worker position required a CDL, that [Keyes] in fact had a CDL and that a transportation worker was expected to be available to drive equipment requiring a CDL to operate at any time that he or she was at work.

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(internal citations omitted). Additionally, although ALJ Gray had not reached the issue of willfulness at the initial hearing, the Personnel Commission nonetheless concluded that Keyes had acted willfully:

6. . . . [Keyes] had admitted that he refused the random drug and alcohol test after being advised that i[t] was a dismissible violation. Therefore, [Keyes]'s refusal was willful. [Keyes] was terminated for just cause (the willful violation of known or written work rules or in the alternative insubordination) as failure to complete the test is grounds for dismissal, according to the [] written policy.

(internal citations omitted).

Thereafter, Keyes filed a Petition for Judicial Review in Superior Court on 19 April 2006, which issued an order affirming the Personnel Commission's decision on 31 July 2006. Keyes appealed that decision to this Court, which remanded the matter to the Superior Court to make "findings of fact and conclusions of law in accordance with [N.C. Gen. Stat. §] 150B-51(c)." *Keyes v. N.C. Dep't of Transp.*, 187 N.C. App. 509, 653 S.E.2d 255, 2007 WL 4233649 (2007) (unpublished) (internal citation and quotation marks omitted). On remand, the Superior Court again affirmed the Personnel Commission's decision in a revised order filed on 5 August 2008.

Appealing from the 5 August 2008 order, Keyes now argues to this Court that the Superior Court erred by: (I) concluding that Keyes was subject to the random testing requirements; (II) making findings of fact which were unsupported by the evidence; and (III) concluding that Keyes's refusal to take the alcohol and drug test was willful because the ALJ did not reach the issue of willfulness and Keyes did not have opportunity to present evidence negating willfulness.

I.

[1] Keyes first argues that the Superior Court erred by giving deference to DOT's interpretation of the terms "safety-sensitive" and "CDL related" job functions, and concluding that Keyes's position fell within those definitions. He contends that because he was not performing "safety-sensitive" and "CDL related" job functions, he was not required to take the random drug and alcohol test on 14 October 2005. We disagree.

The DOT's Controlled Substances Abuse and Alcohol Misuse Standard Policy and Procedure "3.3.3 Random Testing (CDL EMPLOYEES ONLY)" states:

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Unannounced random testing shall be completed on a certain number of employees who are required by the USDOT to have a CDL to perform one or more of their job functions. The FHWA [Federal Highway Administration] requires that the NCDOT randomly test all employees who perform "safety sensitive functions." "Safety Sensitive Functions" are defined as the functions required by Commercial Motor Vehicle Operators. Commercial Motor Vehicle Operators are required to have a CDL. . . . Employees whose names are randomly selected from the pool must be tested just before, during, or immediately after performing CDL related job functions.

N.C. Dep't of Transp., Controlled Substance and Alcohol Policy § 3.3.3 (1999).² The terms "safety sensitive functions" and "CDL related job functions" are not defined in DOT's rules or in the Office of State Personnel's regulations. However, relevant federal regulations provide helpful guidance, particularly because DOT's drug testing program is required by the Federal Highway Administration.

Definitions for these terms appear within the United States Department of Transportation's regulations as follows:

Driver means any person who operates a commercial motor vehicle. This includes, but is not limited to: Full time, regularly employed drivers; *casual, intermittent or occasional drivers*; leased drivers and independent owner-operator contractors.

. . .

Performing (a safety-sensitive function) means a driver is considered to be performing a safety-sensitive function during any period in which he or she is *actually performing, ready to perform, or immediately available to perform any safety-sensitive functions*.

. . .

Safety-sensitive function means *all time from the time a driver begins to work or is required to be in readiness to work until*

2. Section 3.3.3 does not state that refusal to submit to a random drug test will be treated as a positive result, but other related provisions do. For example, note 3 to section 3.3.2, providing for post-accident testing, states: "Employees must submit to post-accident testing and are responsible for ensuring that timelines are met for post-accident testing. If an employee refuses to be tested . . . he or she will be subject to the consequences of a positive test result which is dismissal." Also, section 11.1.1(b), stating the responsibilities for CDL employees, provides that "[e]mployees testing positive for controlled substances shall be dismissed."

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the time he/she is relieved from work and all responsibility for performing work. Safety-sensitive functions shall include:

. . .

(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of Sec. 393.76 of this subchapter);

(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded . . .

49 C.F.R. § 382.107 (2009) (emphasis added).

Here, Keyes argues that he was not subject to DOT's drug testing policy on 14 October 2004 because he had only been assigned to "flagging" that day, and DOT's interpretation of flagging as a safety sensitive or CDL related job function is not a reasonable interpretation entitled to deference. *See Morrell v. Flaherty*, 338 N.C. 230, 238, 449 S.E.2d 175, 180 (1994) (An "agency's interpretation [of its regulations] must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.") (internal quotation marks and citations omitted), *cert. denied*, 515 U.S. 1122, 132 L. Ed. 2d 282 (1995). However, Keyes does not dispute the Superior Court's findings that his job required him to hold a CDL, he could be required to operate commercial equipment on any work day, and he had operated heavy equipment and trucks in the past.

Indeed, the record shows that Keyes had in the past and could in the future be required to operate commercial equipment. Moreover, the record shows that although he performed flagging duty, he was immediately available to operate equipment requiring a CDL. Accordingly, on 14 October 2004, Keyes was at minimum an "occasional driver" according to the USDOT's regulations which guided DOT's interpretation of its rules and regulations. We, therefore, hold that because DOT's interpretation of its rules and regulations was neither plainly erroneous nor inconsistent with its regulations, the Superior Court properly held that Keyes was subject to the random drug test on 14 October 2004.

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II.

[2] Keyes next argues that the Superior Court's findings of fact numbers 17, 18, and 19 are unsupported by the evidence, and are "irrelevant and immaterial to the issues at bar." However, in his brief on appeal, Keyes only specifically challenges the portion of finding of fact number 18 stating "every person who has refused to take a screening test has been terminated."

Keyes argues this finding is improper in light of the following testimony by Jarvis: "If [an employee is] sick or on vacation or working somewhere outside the Division, anybody could be excused from a drug test." However, the record also contains testimony from Ms. Roberts, the administrator of DOT's drug testing program, stating that to her knowledge every employee who refused a drug test has been dismissed.

Because the Superior Court's finding is supported by substantive evidence, we affirm finding of fact number 18.

III.

[3] Finally, Keyes argues that, even if the Superior Court correctly concluded that he was subject to DOT's random drug test, the matter should be remanded to the ALJ to give Keyes an opportunity to present evidence negating willfulness. We agree.

N.C. Gen. Stat. § 150B-51 outlines the proper scope of review for a final agency decision in a contested case. Subsection (c) provides:

In reviewing a final decision in a contested case *in which an administrative law judge made a decision . . .* and the agency does not adopt the administrative law judge's decision, the court shall review the official record, de novo, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the

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agency's failure to provide the explanations; and may take any other action allowed by law.

N.C. Gen. Stat. § 150B-51(c) (2007) (emphasis added). Additionally, on review of a final agency decision allowing judgment on the pleadings,

the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56. If the order of the court does not fully adjudicate the case, the court shall remand the case to the administrative law judge for such further proceedings as are just.

N.C. Gen. Stat. § 150B-51(d) (2007); *see also Eury v. N.C. Employment Sec. Comm.*, 115 N.C. App. 590, 446 S.E.2d 383 (remanding to the Superior Court for remand to the Personnel Commission in light of errors of law and the resultant incomplete condition of the record), *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994).

Here, after DOT's presentation of the evidence at the contested case hearing, Keyes moved for involuntary dismissal under N.C. Gen. Stat. § 1A-1, Rule 41(b) (2007), arguing that DOT failed to present sufficient evidence to meet its burden of proof to show that he was subject to random testing. The record shows that ALJ Gray set forth narrow grounds when concluding that DOT failed to show just cause, and specifically stated that he was not reaching the issue of willfulness:

5. [DOT]'s failure to show by a preponderance of the evidence that [Keyes] was directed to take a random drug and alcohol testing just before, during, or immediately after performing CDL-related job functions violates [DOT]'s Controlled Substance and Alcohol Misuse Standard Policy and Procedure. *Because of this violation, it is not necessary for the court to reach the issue of whether [Keyes] willfully failed to submit himself to random drug and alcohol testing.*

(Emphasis added). Because ALJ Gray never reached the issue of willfulness and Keyes did not have the opportunity to present evidence on that issue, the only issue before the Personnel Commission was whether ALJ Gray properly decided that Keyes was not subject to being dismissed under DOT's Controlled Substance and Alcohol Misuse Standard Policy. Upon rejecting the ALJ's determination that DOT failed to carry its burden of proof on that issue, the matter should have been remanded to the ALJ for further hearing on the issue of whether Keyes's refusal to take the test was "willful."

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Accordingly, we hold that the Personnel Commission erred in concluding that Keyes's refusal to take the drug test was willful, and the Superior Court erred in affirming this decision. Therefore, we remand to the Superior Court for remand to the Personnel Commission for further hearing on the issue of willfulness. § 150B-51(d).

Affirmed in part, remanded in part.

Judges STROUD and BEASLEY concur.

JESSICA HARDY, A MINOR, BY AND THROUGH HER PARENT, GAIL HARDY, PLAINTIFF-
APPELLANT V. BEAUFORT COUNTY BOARD OF EDUCATION; JEFFREY MOSS,
SUPERINTENDENT, BEAUFORT COUNTY SCHOOLS, IN HIS OFFICIAL CAPACITY, DEFENDANTS-
APPELLEES

No. COA08-1053

(Filed 20 October 2009)

**1. Constitutional Law— right to free public education—
access to alternative education**

The trial court did not err by allowing defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) in an action seeking declaratory relief for defendants' alleged failure to provide an alternative education program for a student given a long-term suspension because the disposition of students who have been expelled or suspended is a decision involving the administration of the public schools which is best left to the Legislature.

2. Parties— failure to join necessary party—improper dismissal

The trial court's dismissal for failure to join a necessary party under N.C.G.S. § 1A-1, Rule 12(b)(7) was error because: (1) in the absence of a proper motion by a competent person, the defect should be corrected by an *ex mero motu* ruling of the court; and (2) assuming *arguendo* that the State of North Carolina was a necessary party to this action, the proper remedy was to join the State rather than dismiss the action.

**3. Administrative Law— judicial review—subject matter
jurisdiction**

The trial court did not err by denying defendants' motion to dismiss for lack of subject matter jurisdiction based on plaintiff's

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alleged failure to exhaust administrative remedies prior to filing this declaratory judgment action because plaintiff was challenging the constitutionality of her exclusion from alternative education during her period of suspension rather than a review of the actual suspension, and under these circumstances, plaintiff was without an adequate administrative remedy.

Judge GEER dissenting.

Appeal by plaintiff and cross-appeal by defendants from order entered on 16 May 2008 by Judge William C. Griffin, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 11 February 2009.

Advocates for Children's Services, Legal Aid of North Carolina, Inc., by Erwin Byrd, Keith Howard, and Lewis Pitts; and Children's Law Clinic, Duke University School of Law, by Jane Wettach, for plaintiff-appellant.

Tharrington Smith, L.L.P., by Curtis H. Allen III and Robert M. Kennedy, Jr., for defendant-appellees.

Roberts & Stevens, P.A., by Christopher Z. Campbell and K. Dean Shatley, II, on behalf of North Carolina School Boards Association; and North Carolina School Boards Association, by Allison B. Schafer, amicus curae.

CALABRIA, Judge.

Jessica Hardy ("plaintiff") was a tenth grade student at Southside High School in Beaufort County during the 2007-2008 school year. On 18 January 2008, a fight involving numerous students occurred, and plaintiff was one of the students involved. As a result, plaintiff was subsequently suspended for ten days, beginning 24 January 2008. Additionally, the principal of Southside High School recommended to Beaufort County School Superintendent Jeffrey Moss ("the superintendent"), a long-term suspension for plaintiff for the remainder of the school year. The superintendent followed this recommendation and suspended plaintiff for the remainder of the 2007-2008 school year.

On 26 February 2008, plaintiff filed an action seeking declaratory relief from the Beaufort County Superior Court, alleging the Beaufort County Board of Education and the superintendent ("defendants") violated her constitutional rights. Specifically, plaintiff alleged defend-

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ants' failure to provide an alternative education program for a student given a long-term suspension violated her constitutional right to a free public education. Plaintiff also filed a Motion for Temporary Restraining Order and Preliminary Injunction asking the trial court to order defendants to provide plaintiff with access to educational services during her period of suspension. This motion was denied and the trial court dismissed plaintiff's complaint, pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and 12(b)(7) (2007) of the North Carolina Rules of Civil Procedure. However, the trial court refused to dismiss plaintiff's complaint pursuant to Rule 12(b)(1). Plaintiff appeals the dismissal of her complaint. Defendants cross-appeal the court's denial of their Motion to Dismiss pursuant to Rule 12(b)(1).

I. Dismissal pursuant to Rule 12(b)(6)

[1] Plaintiff argues that the trial court erred by allowing defendants' Motion to Dismiss for failing to state a claim for which relief can be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). We disagree.

On a Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citation omitted). The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief. *See Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987). A superior court's decision to dismiss a complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is reviewed *de novo* by this Court. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

Plaintiff argues that the trial court erred by relying on *In re Jackson*, 84 N.C. App. 167, 352 S.E.2d 449 (1987) in assessing her claims. Plaintiff believes that *Jackson* is no longer viable after the decisions of the North Carolina Supreme Court in *Leandro v. State of North Carolina*, 346 N.C. 336, 488 S.E.2d 249 (1997) and *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004). Both *Leandro* and *Hoke* addressed the qualitative aspects of a public education, determining that N.C. Const. art. I, § 15 and N.C. Const. art. IX, § 2 "combine to guarantee every child of this state an opportunity to

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receive a sound basic education in our public schools.” *Leandro*, 346 N.C. at 347, 488 S.E.2d at 255. Specifically, the *Leandro* and *Hoke* Courts were attempting to remedy significant funding disparities between school districts statewide that were depriving students in poorer districts the opportunity to receive quality education. *Leandro* set out the essential pieces of what it considered to be a sound basic education, which is

one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student’s community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. The problems addressed in these cases were limited to the quality of education in the context of school financing and did not address in any way the subject of school discipline.

Neither the *Leandro* nor the *Hoke* decision provides any guidance on how the fundamental right for an opportunity to receive a sound basic education applies in the context of student discipline. The last pronouncement specifically on the issue was by this Court in *Jackson*. “Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same Court is bound by that precedent, unless it has been overturned by a higher court.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). *Jackson* specifically dealt with the issue of long term student suspensions without access to alternative education, and found the arrangement to be acceptable. “Reasonable regulations punishable by suspension do not deny the right to an education but rather deny the right to engage in the prohibited behavior.” *Jackson*, 84 N.C. App. at 176, 352 S.E.2d at 455. The Court went on to say:

A student’s right to an education may be constitutionally denied when outweighed by the school’s interest in protecting other stu-

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dents, teachers, and school property, and in preventing the disruption of the educational system. As a general rule, a student may be constitutionally suspended or expelled for misconduct whenever the conduct is of a type the school may legitimately prohibit, and procedural due process is provided.

Id. This pronouncement applies directly to the plaintiff's situation and justifies the decision to suspend her until the 2008-2009 school year.

The disposition of students who have been expelled or suspended long term is ultimately a decision involving the administration of the public schools, a decision which is best left to the Legislature. As the Court noted in *Jackson*,

[A] juvenile court judge does not have the power to legislate or to force school boards to do what he thinks they should do. Our legislature did not impose upon the public schools or other agency a legal obligation to provide an alternative forum for suspended students, and a court may not judicially create the obligation.

Id. at 178, 352 S.E.2d at 456. This statement is echoed in *Leandro*. “[T]he administration of the public schools of the state is best left to the legislative and executive branches of government.” *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261. Since the decision in *Jackson* the Legislature has decreed that “[e]ach local board of education shall establish at least one alternative learning program and shall adopt guidelines for assigning students to alternative learning programs.” N.C. Gen. Stat. § 115C-47(32a) (2007). These guidelines include “strategies for providing alternative learning programs, when feasible and appropriate, for students who are subject to long term suspension or expulsion.” *Id.* The Legislature has clearly considered the issue of alternative education for students who are either suspended long term or expelled, and it did not choose to make access to alternative education mandatory. We have no authority to question this judgment.

There is nothing in either *Leandro* or *Hoke* that indicates that the Supreme Court intended to disturb precedent or change the standard of review regarding school discipline. Plaintiff's claims do not address the qualitative aspect of her education, as in *Leandro*, but deal instead with her right to access the public education system. Without a clear indication from a higher court or the Legislature that *Jackson* is no longer good law, we are bound by precedent. The trial

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court, relying on *Jackson*, properly dismissed plaintiff's complaint under Rule 12(b)(6) for failure to state a claim on which relief can be granted. Because dismissal was proper on these grounds, we need not consider plaintiff's additional Rule 12(b)(6) claims.

II. Dismissal pursuant to Rule 12(b)(7)

[2] Although it is not relevant to our disposition of this case, we note that the trial judge's dismissal for failure to join a necessary party pursuant to Rule 12(b)(7) was error. A trial court is in error when it dismisses a case because a necessary party has not been joined. *White v. Pate*, 308 N.C. 759, 764, 304 S.E.2d 199, 202 (1983). When the absence of a necessary party is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action. *Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978). "[I]n the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the court." *Id.* Assuming, *arguendo*, that the State of North Carolina was a necessary party to this action, the proper remedy was to join the State rather than dismiss the action.

III. Dismissal pursuant to Rule 12(b)(1)

[3] Defendants, in their only cross-assignment of error, argue that the trial court erred by denying their motion to dismiss based upon a lack of subject matter jurisdiction. We disagree.

Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. *Harris v. Pembaur*, 84 N.C. App. 666, 667-68, 353 S.E.2d 673, 675 (1987). The standard of review on a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction is *de novo*. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

Defendants argue the trial court lacked subject matter jurisdiction over plaintiff because she failed to utilize the administrative remedies available to her before instituting her action. "[W]here the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). However, when the only remedies available from the agency are shown to be inadequate, a party may seek redress in a court without exhausting administrative remedies. *Huang v. N.C. State University*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 815-16 (1992).

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Defendants allege that plaintiff failed to take advantage of available appeals pursuant to N.C. Gen. Stat. § 115C-391(e) before filing her action. This statute provides that a student suspended for more than ten days may appeal that suspension to the local school board. If the school board upholds the suspension, the student may then seek review in the superior court. N.C. Gen. Stat. § 115C-391(e) (2007). In the instant case, plaintiff filed her action in superior court while the appeal of her suspension before the school board was still pending.

The timing of the filing of plaintiff's action is immaterial because the issues raised by the action could not be addressed by the school board as part of the appeals process. Plaintiff was challenging the constitutionality of her exclusion from alternative education during her period of suspension; she was not seeking review of the actual suspension. The statute would only allow review of the latter, while no administrative procedure would permit review of the former. Under these circumstances, plaintiff was without an adequate administrative remedy and her claim was properly before the superior court. Defendants' cross-assignment of error is overruled.

Affirmed.

Judge ELMORE concurs.

Judge GEER dissents in a separate opinion.

GEER, Judge, dissenting.

For the reasons set out in my dissent filed today in *King v. Beaufort County Bd. of Educ.*, No. COA08-1038, I must respectfully dissent from the majority opinion in this case.

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[200 N.C. App. 410 (2009)]

STATE OF NORTH CAROLINA v. JORGE ALBERTO GALINDO, DEFENDANT

No. COA09-49

(Filed 20 October 2009)

Constitutional Law—right to confrontation—chemical analysis testimony—harmless error beyond reasonable doubt—overwhelming evidence of guilt

Although the admission of an expert's testimony regarding the weight of cocaine found at defendant's residence violated his Sixth Amendment right to confrontation since the testifying expert did not personally perform the analysis and generate the lab report, the error was harmless beyond a reasonable doubt. Defendant's own statement, with the unchallenged testimony of law enforcement officers, established beyond a reasonable doubt that a reasonable jury would have found defendant guilty of trafficking in cocaine even without the expert's testimony.

Appeal by defendant from judgment entered 2 June 2008 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 August 2009.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly W. Duffley, for the State.

Robert W. Ewing for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Jorge Alberto Galindo appeals his convictions for trafficking in cocaine by possession and felonious possession of marijuana. In his sole argument on appeal, defendant contends that admitted expert testimony regarding the weight of the cocaine found at his residence was impermissible hearsay and violated his right to confrontation as the testifying expert did not personally perform the analysis and generate the lab report. Although the admission of the expert's testimony violated defendant's Sixth Amendment right to confrontation, we conclude that the error was harmless beyond a reasonable doubt. We, therefore, uphold defendant's convictions.

Facts

The State's evidence tended to establish the following facts at trial. Based on an informant's tip that drugs were being sold out of a residence on West Ridge Road in Charlotte, North Carolina, Officer

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Steve Selogy with the Charlotte-Mecklenburg Police Department obtained and, along with other officers, executed a search warrant of the residence on 21 August 2007. Selogy and another officer went around the back of the house and saw a van in the driveway, with a man in the driver's seat and defendant standing roughly six feet away. When the officers approached the van, they saw a "clear baggie of a white powdery substance" in the cup holder of the center console. The substance was seized and the two men were handcuffed, frisked for weapons, and then taken inside the residence.

Once inside, Selogy asked the occupants who was in charge of the house. Defendant stated that it was his house. Selogy took defendant into his bedroom and read defendant his *Miranda* rights. He explained to defendant that the house was titled in his father's name and asked whether his father was involved. Defendant responded that anything the police found in the house belonged to him; his father knew nothing about what was going on in the house. Selogy then asked defendant if there was any cocaine, marijuana, or weapons in the house. Defendant responded by pointing to the closet in his bedroom, where the police found a shoe box containing "one kilogram of powder cocaine" that had been "wrapped really tightly with cellophane." The cocaine had a handgun on top of it and another one underneath it.

Selogy asked if there was anything else in the house and defendant told him that there was marijuana in plastic bags in the closet to the right of the shoe box and that there was more cocaine in a "college refrigerator" behind defendant in the bedroom. Inside, officers found several bags of powder cocaine on the top shelf. Defendant also indicated that there was money in the pocket of his Carolina Panthers' jacket; Selogy found over \$1,200.00 in the jacket. On the floor of the bedroom closet, officers found roughly eight pounds of marijuana wrapped in cellophane. In addition to what the officers found in the van and defendant's bedroom, a plastic bag containing cocaine was found inside a box of hot chocolate in the kitchen.

Defendant was arrested and charged with trafficking in cocaine by possession and felonious possession of marijuana. Defendant pled not guilty and the case proceeded to trial. Selogy testified at trial that he was responsible for preparing the property control sheets specifying the amount of drugs seized from the West Ridge Road residence. He stated that the property control sheet indicated that (1) 2.2 pounds of cocaine were found in defendant's bedroom; (2) 100 grams of cocaine were seized from the fridge; (3) 0.7 grams were discovered

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in another closet; (4) 28.9 grams were found in the van; (5) 32.5 grams were discovered in the kitchen; and (6) 11.8 grams were found in a shirt in defendant's bedroom.

Officer Steven Whitsell, a narcotics officer with the Charlotte-Mecklenburg Police Department, testified that he interviewed defendant later on 21 August 2007 and prepared a typed statement describing the interview. According to the statement, defendant told Whitsell "that there was approximately 7-8 pounds of marijuana, approximately a kilogram of cocaine and two guns that he had purchased." Defendant told Whitsell that he had paid "\$3000 for the marijuana, \$15000 for the kilo of cocaine, and \$400 for the guns."

Michael Aldridge, a chemist with the Charlotte-Mecklenburg Police Department crime laboratory, testified that he had been the supervisor of the lab for 20 years. Aldridge testified that although he did not personally weigh or observe the weighing of the seized cocaine, as part of his supervisory duties he calibrated the scale on which it was weighed both the month before and after it was weighed and found that the scale was in "perfect working order." When asked, Aldridge stated that the analyst that had identified and weighed the cocaine and prepared the lab report was currently working in a crime lab in South Carolina and that she had not been subpoenaed to testify.

Aldridge explained the chain of custody procedures at the lab and stated that they had been followed in this case. Aldridge stated that the lab's analysis procedures exceeded industry standards and that the types of tests performed and recorded in the lab's reports are relied upon by experts in the field of forensic chemistry. Aldridge then went on to testify that in his opinion—based "solely" on the lab report—the substances seized from the West Ridge Road residence were, in fact, marijuana and cocaine. With respect to the cocaine, Aldridge gave his opinion—over defendant's objections—that approximately 1031.83 grams of cocaine were found in various parcels.

Defendant moved to dismiss the charges for insufficient evidence, which was denied. Defendant did not testify or present any evidence in his defense. The jury convicted defendant of both charges, and the trial court consolidated them into one judgment and sentenced defendant to a presumptive-range term of 175 to 219 months imprisonment with a credit of 255 days already served. Defendant timely appealed to this Court.

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Discussion

Defendant's sole argument on appeal is that the expert testimony by Aldridge, the crime lab supervisor, as to the weight of the cocaine found at defendant's residence constituted impermissible hearsay and violated his right to confront an adverse witness under the Sixth Amendment, as applied in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), and most recently in *Melendez-Diaz v. Massachusetts*, 557 U.S. —, 174 L. Ed. 2d 314 (2009). Defendant does not challenge Aldridge's testimony that the substances are, in fact, marijuana and cocaine. Nor does defendant argue for reversal of his conviction for felonious possession of marijuana.

The Confrontation Clause of the Sixth Amendment "guarantees a defendant's right to confront those 'who bear testimony' against him." *Melendez-Diaz*, 557 U.S. at —, 174 L. Ed. 2d at 321 (quoting *Crawford*, 541 U.S. at 51, 158 L. Ed. 2d at 193). Thus, "[a] witness's testimony against a defendant is . . . inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Id.* at —, 174 L. Ed. 2d at 321. The State contends that the lab reports underlying Aldridge's testimony are not "testimonial" in nature, and, therefore, his testimony is not barred by the Confrontation Clause.

Although the Supreme Court has declined to exhaustively define what amounts to a "testimonial" statement, the Court in *Crawford* observed:

Various formulations of this core class of "testimonial" statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

541 U.S. at 51-52, 158 L. Ed. 2d at 193 (internal citations, quotation marks, and alterations omitted).

More recently in *Melendez-Diaz*, 557 U.S. —, 174 L. Ed. 2d at 320, the Supreme Court addressed the constitutionality of the admis-

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sion of “‘certificates of analysis’ showing the results of the forensic analysis performed on the seized substances.” Because the sole purpose of admitting the sworn certificates under state law was to provide *prima facie* evidence of the composition, quality, and weight of the substance at trial, “[t]here [wa]s little doubt that the documents . . . fall within the ‘core class of testimonial statements’ ” outlined in *Crawford*. *Id.* at —, 174 L. Ed. 2d at 321 (quoting *Crawford*, 541 U.S. at 51, 158 L. Ed. 2d at 203). Thus the Supreme Court held that under a “rather straightforward application of our holding in *Crawford*,” analysis reports were “testimonial statements, and the analysts were ‘witnesses’ for purposes of the Sixth Amendment.” *Melendez-Diaz*, 557 U.S. at —, 174 L. Ed. 2d at 322.

Our Supreme Court has recently held that under *Melendez-Diaz*, opinion testimony based on an autopsy report including forensic pathology and dental analyses was “testimonial” in nature. *State v. Locklear*, — N.C. —, —, 681 S.E.2d 293, 304-05 (2009). The *Locklear* Court thus held that the defendant’s right to confrontation was violated by the admission of the expert testimony based on the pathologist’s and dentist’s reports where the “State failed to show that either witness was unavailable to testify or that defendant had been given a prior opportunity to cross-examine them.” *Id.* at —, 681 S.E.2d at 305.

The evidence in this case—Aldridge’s expert testimony based “solely” on the absent analyst’s lab report—is indistinguishable from the opinion testimony held to be unconstitutional in *Locklear*. Similarly, as the State failed to show that the lab analyst who actually weighed the cocaine was unavailable to testify or that defendant had a prior opportunity to cross-examine the analyst regarding the specific report at issue in this case, defendant’s right to confront an adverse witness was violated. The trial court thus erred in overruling defendant’s objections.¹

Reversal is not required, however, if the error was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (2007) (“A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless . . . it was harmless beyond a reasonable doubt.”); *State v. Lewis*, 361 N.C. 541, 549, 648 S.E.2d 824, 830 (2007) (applying harmless beyond reasonable doubt analysis to Confrontation Clause violation). “[O]verwhelming evidence of

1. At the time of defendant’s trial, 29 April 2009 through 2 May 2009, the United States Supreme Court had not yet rendered its decision in *Melendez-Diaz* (25 June 2009).

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guilt may render error of constitutional dimension harmless beyond a reasonable doubt.” *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988).

Here, in this case, without objection from defendant, the State produced a statement by defendant that law enforcement officers seized a “kilogram of cocaine” from his residence. In addition, Officer Selogy—the lead police officer executing the search warrant—testified at trial that the cocaine seized at defendant’s residence was weighed at the scene and the weight was recorded on property control sheets, which showed six parcels containing over a kilogram of cocaine in total. Defendant’s own statement, in conjunction with the unchallenged testimony of law enforcement officers that they seized over one kilogram of cocaine establishes beyond a reasonable doubt that, absent the admission of Aldridge’s testimony, a reasonable jury would have found defendant guilty of trafficking in cocaine. *See* N.C. Gen. Stat. § 90-95(h)(3) (2007) (providing that “[a]ny person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine” is guilty of “‘trafficking in cocaine’ ”); *see also Locklear*, — N.C. at —, 681 S.E.2d at 305 (finding Confrontation Clause violation harmless beyond reasonable doubt where “State presented copious evidence” of defendant’s guilt). Consequently, we find no prejudicial error.

No Prejudicial Error.

Chief Judge MARTIN and Judge BRYANT concur.

STATE OF NORTH CAROLINA v. WAYNE CARROUTHERS

No. COA09-31

(Filed 20 October 2009)

Search and Seizure— search after handcuffing—standard for determining arrest

The trial court erred by granting a motion to suppress the discovery of crack cocaine seized after defendant was placed in handcuffs. The trial court applied the incorrect standard to determine whether defendant was under arrest; the question is whether special circumstances existed justifying the use of hand-

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cuffs as the least intrusive means necessary to carry out the purpose of the stop rather than whether a reasonable person would have felt free to leave after he was handcuffed.

Appeal by the State of North Carolina from order entered 25 September 2008 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County. Heard in the Court of Appeals 19 August 2009.

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Reece, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for Defendant-Appellee.

McGEE, Judge.

Wayne Carrouthers (Defendant) was arrested on 14 September 2007 and charged with the sale of cocaine and resisting a public officer. Defendant was later indicted for possession of cocaine with intent to sell or deliver and being an habitual felon in addition to the above. The later indictments also arose from the 14 September 2007 encounter of Defendant and law enforcement agents. Defendant filed a pre-trial motion on 29 August 2008 to suppress evidence obtained by a police officer during the encounter leading to his arrest. The trial court held a hearing on Defendant's pre-trial motion to suppress and entered an order on 25 September 2008.

At the suppression hearing, Agent Robert Huneycutt (Agent Huneycutt) of the North Carolina Alcohol Law Enforcement agency testified that he was conducting a routine surveillance for alcohol and drug offenses in the parking lot of a convenience store in Charlotte, North Carolina on 14 September 2007. He testified he had previously conducted such surveillance at the convenience store and that his surveillance had led to "numerous charges [for] . . . [a]lcohol and narcotics" offenses.

Agent Huneycutt testified that shortly after he pulled into the convenience store parking lot, another vehicle pulled in and parked next to him at a distance of no more than twenty feet. There were two females in the front seat of the vehicle, being the driver and a passenger. In addition to the two females, there was a male passenger (later identified as Defendant) in the back seat. Agent Huneycutt had had no prior contact with Defendant. From his parked car, Agent Huneycutt observed an interaction between Defendant and two

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unidentified men standing on the sidewalk. Agent Huneycutt saw Defendant lean out of the rear window of the vehicle and speak with the two unidentified men. One of the men approached Defendant and Defendant opened the rear door of the vehicle.

Agent Huneycutt testified he observed the unidentified man kneel down and hold his hand out with his palm up. Defendant then reached to his left side, withdrew something, and held the object in front of him. Defendant placed something in the man's open hand three times. Because Agent Huneycutt's vision was obstructed, he was unable to identify what Defendant put in the man's hand. However, Agent Huneycutt testified that the actions he observed were "consistent with drug activity or a hand-to-hand drug transaction." The unidentified man then stood, closed his hand into a fist, and walked away.

Agent Huneycutt approached Defendant, who was then standing just outside the vehicle. Agent Huneycutt identified himself as a law enforcement officer and stated to Defendant what he had observed. Defendant denied that a drug transaction had occurred and told Agent Huneycutt that he had given the unidentified man a cigarette. Agent Huneycutt responded that had Defendant given the man a cigarette, the man would have placed the cigarette "in his mouth, behind his ear, or [would] still ha[ve] it in his hand."

Agent Huneycutt testified he was not satisfied with Defendant's explanation of the activity and, fearing that Defendant had secreted a weapon about his person, Agent Huneycutt performed an investigative pat-down of Defendant. Defendant was wearing baggy jeans and an over-sized shirt. Agent Huneycutt found no weapons, but he felt a lumpy plastic bag in one of Defendant's pockets. Agent Huneycutt testified that he did not manipulate the object, but that "it was immediately apparent that [Defendant] had contraband in his left front pocket." After feeling Defendant's pocket, Agent Huneycutt placed Defendant in handcuffs. Agent Huneycutt testified that he placed Defendant in handcuffs "for officer safety" because of the presence of the other people in Defendant's car.

Agent Huneycutt testified that, after being placed in handcuffs, Defendant "made a spontaneous utterance that he had sold the individual a couple of rocks," and that Defendant had "some stuff in his pocket." Agent Huneycutt then seized a plastic bag containing six rocks of crack cocaine from Defendant's pocket.

At the suppression hearing, the trial court made findings of fact and conclusions of law, concluding that:

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1. When Mr. Carrouthers was handcuffed by Agent Huneycutt, he was under arrest since a reasonable person would not have felt free to leave.
2. No probable cause to arrest existed at the time Mr. Carrouthers was arrested by Agent Huneycutt.
3. The arrest of Mr. Carrouthers by Agent Huneycutt was illegal and as such was a violation of his right to be free from unreasonable seizures as guaranteed by the Fourth Amendment of the United States Constitution, the Constitution of North Carolina, Article I, §§19 and 23, and N.C.G.S. 15A-972 *et seq.*

The trial court granted Defendant's motion to suppress in an order entered 25 September 2008. The State appeals.

The State argues in its first assignment of error that the trial court applied the incorrect standard in determining whether Defendant was under arrest. The State asserts the trial court erred in basing its decision on whether a reasonable person would have felt free to leave during the interaction, rather than determining whether there existed special circumstances which would justify Agent Huneycutt's actions, and whether those actions were the least intrusive means of carrying out the purpose of the stop. We agree.

In reviewing an order granting a motion to suppress, we are "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Findings of fact which are not challenged are "deemed to be supported by competent evidence and are binding on appeal." *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36, *disc. review denied*, 358 N.C. 240, 594 S.E.2d 199 (2004). "'[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.'" *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001)).

In the case before us, the trial court's conclusions of law do not reflect "a correct application of applicable legal principles to the facts found." *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826. The Fourth Amendment to the Constitution of the United States guar-

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antees that “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated[.]” U.S. Const. Amend. IV. The Fourteenth Amendment makes this provision applicable to the States. *See State v. Milien*, 144 N.C. App. 335, 339, 548 S.E.2d 768, 771 (2001). Generally, a person can be “seized” in two ways for the purposes of a Fourth Amendment analysis: by arrest or by investigatory stop. *Milien*, 144 N.C. App. at 339, 548 S.E.2d at 771. “[A] formal arrest always requires a showing of ‘probable cause.’” *Id.*

By contrast, an officer may detain an individual for an investigatory stop upon a showing that “the officer has reasonable, articulable suspicion that a crime may be underway.” *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007), *aff’d*, 362 N.C. 244, 658 S.E.2d 643, *cert. denied*, — U.S. —, 172 L. Ed. 2d 198 (2008). If, during an investigatory stop, an officer develops a reasonable suspicion that the suspect may be armed, the officer may pat down the clothing of the suspect to determine whether the suspect is in fact armed. *Terry v. Ohio*, 392 U.S. 1, 30-31, 20 L. Ed. 2d 889, 911 (1968). The characteristics of the investigatory stop, including its length, the methods used, and any search performed, “should be the least intrusive means reasonably available to effectuate the purpose of the stop.” *State v. Campbell*, 188 N.C. App. 701, 708, 656 S.E.2d 721, 727 (2008).

However, in performing an investigatory stop, “police officers are ‘authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.’” *Id.* at 709, 656 S.E.2d at 727 (quoting *United States v. Hensley*, 469 U.S. 221, 235, 83 L. Ed. 2d 604, 616 (1985)). In order to “maintain the status quo” or to ensure officer safety, officers are permitted to engage in conduct and use “forms of force typically used during [a formal] arrest.” *Campbell*, 188 N.C. App. at 709, 656 S.E.2d at 727 (quoting *Longshore v. State*, 399 Md. 486, 509, 924 A.2d 1129, 1142, (2007)). Such permissible conduct may include “placing handcuffs on suspects, placing the suspect in the back of police cruisers, [or] drawing weapons.” *Id.*

If the methods used by the police exceed those least intrusive means reasonably required to carry out the stop, the encounter evolves into a *de facto* arrest, creating the need for the police to show probable cause to support the detention. *Milien*, 144 N.C. App. at 340, 548 S.E.2d at 772. Whether a particular action on the part of the police exceeds permissible conduct is determined based on the facts and circumstances of each case.

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In the case before us, the trial court applied an incorrect standard to determine whether Defendant was under arrest at the time the contraband was discovered, concluding that, when Defendant “was handcuffed by Agent Huneycutt, he was under arrest since a reasonable person would not have felt free to leave.” Instead, the trial court must determine whether special circumstances existed that would have justified Agent Huneycutt’s use of handcuffs such that they remained the least intrusive means reasonably necessary to carry out the purpose of the stop. We therefore reverse the trial court’s order granting Defendant’s motion to suppress.

As a finder of fact, the trial court is in the best position to make the necessary “fact-specific assessments and inquiries.” *Buchanan*, 353 N.C. at 342, 543 S.E.2d at 830. We thus remand this matter to the trial court to determine whether there existed special circumstances justifying the handcuffing of Defendant as the least intrusive means reasonably necessary to carry out the purpose of the investigatory stop. In light of our holding, we decline to address the State’s remaining argument.

Reversed and remanded.

Judges JACKSON and ERVIN concur.

SHONDA ALSTON, PLAINTIFF-APPELLEE v. FEDERAL EXPRESS CORP. AND SEDGWICK
CMS, DEFENDANTS-APPELLANTS

No. COA09-115

(Filed 20 October 2009)

1. Workers’ Compensation— statutory lien—amount—subject matter jurisdiction—Rule 60(b) relief

The trial court had subject matter jurisdiction to enter an amended order in an action to determine the amount of defendants’ statutory workers’ compensation lien. Rule 60(b) relief is within the sound discretion of the trial court, the court’s intentions about the distribution of attorney fees is not clear from the record, and subsequent correspondence by the parties suggested that neither the parties nor the Industrial Commission could agree on how to interpret the court’s order.

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2. Workers' Compensation—lien—statutory—attorney fees

The trial court erred in an action to determine the amount of a workers' compensation lien by awarding attorney fees under N.C.G.S. § 97-10.2(j). Attorney fees are not allowed as a part of the costs in civil actions or special proceedings without express statutory authority and N.C.G.S. § 97-10.2(j) does not authorize an award of attorney fees as part of the costs of third-party litigation.

3. Workers' Compensation—lien—findings

The trial court erred by failing to consider and make findings as to factors that must be considered pursuant to N.C.G.S. § 97-10.2(j). Although the statute gives the court the discretion to adjust the amount of a workers' compensation lien, the court must make findings and conclusions sufficient for meaningful appellate review.

Appeal by defendants from order entered 17 July 2008 by Judge A. Leon Stanback, Jr. in Durham County Superior Court. Heard in the Court of Appeals 20 August 2009.

James E. Rogers, P.A., by James E. Rogers, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, LLP, by Roy G. Pettigrew and Meredith Taylor Berard, for defendants-appellants.

CALABRIA, Judge.

Federal Express Corp. ("FedEx") and Sedgwick CMS (collectively "defendants") appeal from an amended order entered 17 July 2008, setting the amount of defendants' workers' compensation lien pursuant to N.C. Gen. Stat. § 97-10.2(j) (2007). We vacate in part, reverse in part, and remand for further findings.

I. Procedural History

Shonda Alston ("plaintiff") was working as a courier for FedEx when she was involved in an automobile collision in Durham County on 24 November 2004. The driver of the other automobile, an employee with the North Carolina Department of Transportation ("NCDOT"), failed to reduce his speed and crashed into the rear of plaintiff's FedEx vehicle. Plaintiff sustained multiple injuries, including an injury to her left knee. According to plaintiff's treating physician, she will eventually need a total knee replacement.

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As a result of plaintiff's injuries, defendants paid \$51,789.06 in medical expenses, \$32,886.78 in wage benefits, and a \$142,500.00 settlement of the workers' compensation claim. Plaintiff resolved her State Tort Claim against NCDOT by entering into a settlement agreement for \$300,000.00 ("the third-party settlement"). After deducting attorney's fees, plaintiff estimated the amount of her recovery was \$198,400.00.

On 16 August 2007, plaintiff filed an application in Durham County Superior Court, pursuant to N.C. Gen. Stat. § 97-10.2(j) (2007), to determine the amount, if any, of defendants' statutory lien. On 12 October 2007, the trial court entered an order reducing defendants' lien to \$50,000.00. The order did not mention any amount for attorney's fees.

Plaintiff submitted to the North Carolina Industrial Commission ("the Commission") a proposed order to distribute the third-party settlement proceeds. On 20 March 2008, the Commission entered an order finding and concluding that defendants were entitled to a statutory lien of \$50,000.00. Plaintiff filed a Motion for Reconsideration with the Commission on 28 March 2008, asserting that it was the intention of the trial court to reduce defendants' lien by the amount of plaintiff's attorney's fees. On 22 April 2008, the Commission filed an order staying its disbursement order pending a further ruling on the proper distribution of the third-party settlement funds.

On 28 May 2008, plaintiff filed a Motion to Clarify the Order Setting the Amount of Workers' Compensation Lien ("Motion to Clarify") in Durham County Superior Court. On 17 July 2008, the trial court entered an Amended Order. The only change from the original order was the addition of a single conclusion of law, that defendants "shall pay [their] share of attorney fees." Defendants appeal.

II. Jurisdiction

[1] Defendants argue that the trial court was without subject matter jurisdiction to enter its amended order. We disagree. "[W]hether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*." *Ales v. T. A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004).

Although plaintiff does not cite any particular rule of civil procedure in her "Motion to Clarify," it appears to be a motion for relief from the trial court's original order. Rule 60(b) of the North Carolina

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Rules of Civil Procedure allows the trial court, upon appropriate motion, to:

relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) The judgment is void; (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2007). Additionally,

If the motion does not allege factual allegations corresponding to the specific situations contemplated in clauses (1) through (5), subsection (6) serves as a grand reservoir of equitable power by which a court may grant relief from an order or judgment. The expansive test by which relief can be given under subsection (6) is whether (1) extraordinary circumstances exist and (2) there is a showing that justice demands it.

In re Oxford Plastics v. Goodson, 74 N.C. App. 256, 259, 328 S.E.2d 7, 9 (1985) (internal quotations and citations omitted). “The purpose of Rule 60(b) is to strike a proper balance between the conflicting principles of finality and relief from unjust judgments. Generally, the rule is liberally construed.” *Carter v. Clowers*, 102 N.C. App. 247, 254, 401 S.E.2d 662, 666 (1991) (citations omitted). The motion for relief from a judgment or order made pursuant to Rule 60(b) is within the sound discretion of the trial court and the trial court’s decision will not be disturbed absent an abuse of that discretion. *Oxford*, 74 N.C. App. at 259, 328 S.E.2d at 9. In the instant case, it is unclear whether the trial court’s initial order intended the reduction of the lien to \$50,000.00 as a final reduction or whether the lien was to be further reduced for attorney’s fees. Although the trial court’s intentions regarding the distribution of attorney’s fees is not clear from the record, subsequent correspondence by the parties suggested that neither the parties nor the Commission could agree on how to interpret the trial court’s order. Pursuant to Rule 60(b)(6)’s “grand

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reservoir of equitable power,” the trial court had jurisdiction to revisit its order so that its intentions could be made clear. This assignment of error is overruled.

III. Attorney’s Fees

[2] Defendants argue that an award of attorney’s fees is not authorized by N.C. Gen. Stat. § 97-10.2(j). We agree.

“[A] successful litigant may not recover attorneys’ fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute.” *Southland Amusements & Vending, Inc. v. Rourk*, 143 N.C. App. 88, 94, 545 S.E.2d 254, 257 (2001) (internal quotations omitted). The general rule in North Carolina is that attorney’s fees are not allowed as a part of the costs in civil actions or special proceedings, unless there is express statutory authority for fixing and awarding the attorney’s fees. *Bowman v. Chair Co.*, 271 N.C. 702, 704, 157 S.E.2d 378, 379 (1967) (citations omitted).

Plaintiff’s action was brought pursuant to N.C. Gen. Stat. § 97-10.2(j), which states, in relevant part: “the judge shall determine, in his discretion, the amount, if any, of the employer’s lien, whether based on accrued or prospective workers’ compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer.” N.C. Gen. Stat. § 97-10.2(j) (2007). There is no express authority in N.C. Gen. Stat. § 97-10.2(j) that provides an award of attorney’s fees as part of the costs of third-party litigation.

In the instant case, the trial court awarded plaintiff attorney’s fees because it considered attorney’s fees to be included in the cost of the plaintiff’s third-party settlement litigation. In the absence of any express authority to award attorney’s fees, this portion of the trial court’s order was erroneous as a matter of law. The portion of the trial court’s order granting plaintiff the payment of a portion of her attorney’s fees by defendants is vacated.

IV. Remainder of the Amended Order

[3] Defendants argue the trial court erred by failing to consider and make findings in its order as to factors that must be considered pursuant to N.C. Gen. Stat. § 97-10.2(j). We agree.

The trial court has discretion under N.C. Gen. Stat. § 97-10.2(j) to adjust the amount of a workers’ compensation lien, even if the result

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is a double recovery for the plaintiff. *Holden v. Boone*, 153 N.C. App. 254, 257, 569 S.E.2d 711, 713 (2002). However, “the discretion granted [to the trial court] under G.S. § 97-10.2(j) is not unlimited; ‘the trial court is to make a reasoned choice, a judicial value judgment, which is factually supported . . . [by] findings of fact and conclusions of law sufficient to provide for meaningful appellate review.’ ” *In re Biddix*, 138 N.C. App. 500, 504, 530 S.E.2d 70, 72 (2000) (quoting *Allen v. Rupard*, 100 N.C. App. 490, 495, 397 S.E.2d 330, 333 (1990)). Pursuant to N.C. Gen. Stat. § 97-10.2(j),

[t]he judge shall consider the anticipated amount of prospective compensation the employer or workers’ compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer’s lien.

N.C. Gen. Stat. § 97-10.2(j)(2007) (emphasis added).

Although we have held that there is no mathematical formula or set list of factors for the trial court to consider in making its determination, it is clear from the use of the words “shall” and “and” in subsection (j), that the trial court *must, at a minimum, consider the factors that are expressly listed in the statute*. Otherwise, such words are rendered meaningless.

In re Estate of Bullock, 188 N.C. App. 518, 526, 655 S.E.2d 869, 874 (2008) (internal citation omitted) (emphasis added). In the instant case, there are no findings of fact in the trial court’s order for the following mandatory statutory factors: (1) the net recovery to plaintiff; (2) the likelihood of plaintiff prevailing at trial or on appeal; and (3) the need for finality in the litigation. The findings provided in the trial court’s order are insufficient to determine “whether the court properly exercised its discretion or if it acted under a misapprehension of law” when it reduced the amount of defendants’ lien. *Id.* at 527, 655 S.E.2d at 875. As a result, the trial court’s order must be reversed and remanded for additional findings.

The record on appeal includes an additional assignment of error by defendants and a cross-assignment of error by plaintiff not addressed in their respective briefs to this Court. Pursuant to N.C.R. App. P. 28(b)(6) (2008), we deem them abandoned and need not address them.

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Vacated in part, reversed in part, and remanded for additional findings.

Judges BRYANT and ELMORE concur.

MAUREEN PLOMARITIS (WARD), PLAINTIFF v. TITUS PLOMARITIS, DEFENDANT

No. COA08-1303

(Filed 20 October 2009)

Appeal and Error— interlocutory orders—production of information

An appeal was dismissed as interlocutory in a child support matter where the order appealed from required the submission of affidavits specifying relevant extraordinary expenses, the trial court did not certify the order for immediate appeal, and defendant did not offer an argument that the order affected a substantial right.

Appeal by Defendant from order entered 9 November 2007 by Judge Susan R. Burch in Guilford County Superior Court. Heard in the Court of Appeals 6 May 2009.

Hill, Evans, Jordan & Beatty, PLLC, by Elaine Hedrick Ashley and Robert E. Gray, III, for Plaintiff-Appellant.

The Law Office of Robert N. Weckworth, Jr., by Robert N. Weckworth, Jr., for Defendant-Appellee.

BEASLEY, Judge.

Defendant appeals from an order modifying his monthly child support obligation for his four children. We dismiss this appeal as interlocutory.

Defendant and Plaintiff were married in 1984, separated in 2003, and divorced in 2004. Plaintiff and Defendant had four children together during their marriage. On 4 December 2003, Plaintiff filed a complaint against Defendant in Guilford County seeking legal and physical custody of the parties' children, child support, equitable distribution, post-separation support, and alimony. On the same day, Defendant filed a complaint seeking child support and custody.

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In March 2004, a child support order was entered in Rockingham County, ordering Defendant to pay \$1,375.00 monthly in temporary child support and to pay 85% of the following expenses: health and hospitalization insurance coverage, tuition, orthodontic expenses, and uninsured medical expenses. In November 2004, a consent order was entered that ordered Defendant to be “responsible for the scheduling, transportation, and lodging of the minor child, Molly, in connection with all her golf tournaments.”

In July 2006, the March 2004 order was amended in an order providing, in relevant part, that Defendant was responsible for 100% of all golf expenses incurred by their minor children, including lessons, tournaments, travel, and equipment and that Defendant was responsible for 85% of the private school tuition for one of the children.

On 5 October 2005, Defendant made a motion to modify the terms and conditions of his monthly child support obligation and certain other expenses. Defendant asked the trial court to reduce his monthly child support obligation and to:

consider the appropriate share of each parties’ responsibility for Molly’s tuition and expenses at the private school/golf academy, as Defendant contend[ed] that said tuition and expenses were not in existence at the time the hearing was concluded . . . and were not considered by the Court. Furthermore, Defendant contend[ed] that the tuition and expenses of said private school/golf academy [was] beyond the scope of the intention of the Court’s order as it relates to the parties responsibility for “golf expenses incurred by the minor children.”

During hearings conducted on 6 October 2006, 17 November 2006, 27 November 2006, 29 November 2006, 4 December 2006, 27 July 2007, and 13 September 2007, the trial court obtained evidence of Defendant’s income.

In November 2007, the trial court entered an order as follows:

1. The Defendant shall pay the sum of \$700 per month as child support to the Plaintiff for the benefit of the minor child Molly. Beginning as of September 2006 and continuing so long as the minor child Evan resides with the Wallace’s, the Plaintiff shall pay to the Defendant the sum of \$60.00 per month as her contribution to the support of the minor child Evan.
2. Each party shall prepare an affidavit of any golf-related expenses paid which are for golf academy/instruction, tourna-

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ment entry fees, tournament transportation and lodging cost, practice round cost and equipment cost within 20 days of the entry of this order and shall serve same upon the other and submit each to the Court.

3. The Defendant shall continue to be responsible for 85% of the health and hospitalization insurance coverage for the minor children Molly and Evan, 85% of the orthodontic expenses, 85% of the tuition expenses, and 85% of the uninsured medical expenses.

4. The Defendant shall pay 85% of the extraordinary expenses related to golf for the minor child Molly. These expenses shall include the cost of the golf academy, tournament entry fees, transportation and lodging cost, practice round cost and equipment cost. These expenses shall not include food costs or clothing. Defendant shall not be responsible for any amount of equipment cost which exceeds \$500 per calendar year. The expenses shall be the actual cost paid by Plaintiff, but shall not exceed the estimated amounts as provided by the IGA golf academy.

5. Plaintiff shall submit evidence of actual expenses for such golf-related activities to Defendant within 30 days of incurring them. Defendant shall reimburse Plaintiff for 85% of said expenses within 30 days of its receipt. . . .

6. This order is effective as of the 1st day of November, 2005 and relates back to that date.

From this order, Defendant appeals.

“A judgment is either interlocutory or the final determination of the rights of the parties.” N.C. Gen. Stat. § 1A-1, Rule 54(a) (2007). “[A]n order ‘made during the pendency of an action, which does not dispose of the case, but leaves it for further action,’ is interlocutory and not immediately appealable.” *Akers v. City of Mt. Airy*, 175 N.C. App. 777, 778-79, 625 S.E.2d 145, 146 (2006) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). “Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *State v. Sanchez*, 175 N.C. App. 214, 215-16, 623 S.E.2d 780, 781 (2005) (citation omitted). “Since the question whether an appeal is interlocutory presents a jurisdictional issue, this Court has an obligation to address the issue *sua sponte* regardless whether it is raised by the parties.” *Akers*, 175 N.C. at 778, 625 S.E.2d at 146 (citation omitted).

PLOMARITIS v. PLOMARITIS

[200 N.C. App. 426 (2009)]

In the instant case, the trial court concluded in the November 2007 order that:

further affidavits of actual expenses incurred by each parent for the appropriate golf-related categories of golf academy/instruction cost, tournament entry fees, tournament transportation and lodging cost, practice round cost and equipment cost from the date of filing of the motion [were] necessary to correctly apportion each parent's contribution to the cost of the expenses.

Accordingly, the trial court ordered that each party submit affidavits to the court and to each other, specifying the relevant golf-related expenses incurred, within 20 days of the entry of the order. Thus, the order modifying child support is interlocutory as it "[did] not dispose of the case, but [left] it for further action by the trial court in order to settle and determine the entire controversy." *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001) (citation omitted).

An interlocutory order is immediately appealable only under two circumstances. *Id.* "First, 'if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie.'" *Id.* at 164-65, 545 S.E.2d at 261 (quoting *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995)). In the present case, the trial court did not certify the order pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2007), and therefore it is not immediately appealable under this provision. Secondly, an interlocutory order is immediately appealable if "the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Id.* at 165, 545 S.E.2d at 261 (citing *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980)). "A substantial right is a right which will be lost or irretrievably adversely affected if the order is not reviewable before the final judgment." *Interior Distribs., Inc. v. Autry*, 140 N.C. App. 541, 544, 536 S.E.2d 853, 855 (2000). "The burden is on [Defendant] to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." *Embler*, 143 N.C. App. at 166, 545 S.E.2d at 262. Defendant "offers no argument that the [November 2007] order has affected a substantial right, and we decline to construct one for him." *In re A.R.G.*, 361 N.C. 392, 397, 646 S.E.2d 349, 352 (2007).

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[200 N.C. App. 430 (2009)]

For the foregoing reasons, we hold that there is no right to immediate appeal from this interlocutory order and dismiss Defendant's appeal.

Appeal dismissed.

Judges McGEE and HUNTER, Robert C. concur.

STATE OF NORTH CAROLINA v. KELLY LEIANNE MANGINO

No. COA08-1555

(Filed 20 October 2009)

**Constitutional Law— North Carolina—separation of powers—
making rules of practice and procedure in district and
superior courts**

The superior court erred by concluding that N.C.G.S. §§ 20-38.6(f) and 20-38.7(a) violated the separation of powers provision of the North Carolina Constitution. The challenged statutes are within the General Assembly's constitutional power to make rules of practice and procedure in the district and superior courts, and to provide a system of appeals between those courts.

Appeal by the State from order entered 15 August 2008 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 18 August 2009.

Attorney General Roy Cooper, by Assistant Attorney General Sebastian Kielmanovich, for the State.

Assistant Public Defender Dean P. Loven, for defendant.

WYNN, Judge.

In implied-consent cases, N.C. Gen. Stat. § 20-38.6(f) (2007) provides that district court judges shall “preliminarily indicate whether a pretrial motion to suppress or dismiss should be granted or denied[,]” but “shall not enter a final judgment on the motion until the State has appealed to superior court or has indicated it does not intend to appeal” under N.C. Gen. Stat. § 20-38.7(a) (2007).

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[200 N.C. App. 430 (2009)]

In this appeal, the State challenges the superior court's holding that sections 20-38.6(f) and 20-38.7(a) ("the challenged statutes") are unconstitutional on various grounds including: separation of powers; substantive due process, because a defendant's right to a final judgment is a fundamental right infringed by the statutory appellate procedure, and because the statutory appellate procedure is arbitrary and capricious and bears no rational relationship to a legitimate state interest; and procedural due process, because a defendant's right to a final judgment is a property right. Additionally, Defendant cross assigns that the superior court erred by not holding the challenged statutes unconstitutional on equal protection and alternative substantive due process grounds. For the reasons given in our recently filed opinion, *State v. Fowler*, — N.C. App. —, 676 S.E.2d 523 (2009) (filed 19 May 2009), we hold that the challenged statutes do not violate the substantive due process, procedural due process, or equal protection clauses of the State and Federal Constitutions.

However, in *Fowler*, while this Court observed "no usurpation of the judicial power of the State by the Legislature in the enactment of these statutory provisions[,] it also acknowledged that the separation of powers question was not properly preserved for its review. *See id.* at —, 676 S.E.2d at 537. Because the State properly preserved that issue in this appeal, we now address whether the superior court erred by concluding that the challenged statutes violate the separation of powers provision of the North Carolina Constitution.

Under the North Carolina Constitution, "[t]he General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article." N.C. Const. art. IV, § 1. As this Court observed in *Fowler*, however, the General Assembly is also constitutionally authorized to prescribe rules of procedure and practice in the district and superior court divisions of the General Court of Justice.

The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division. The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court. No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury. If the General Assembly should delegate to the Supreme Court the rule-making power, the

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General Assembly may, nevertheless, alter, amend, or repeal any rule of procedure or practice adopted by the Supreme Court for the Superior Court or District Court Divisions.

N.C. Const. art. IV, § 13(2). Additionally, the North Carolina Constitution extends to the General Assembly the power to prescribe the jurisdiction of the trial courts and provide a system of appeals:

(3) Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State. The Clerks of the Superior Court shall have such jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable in every county of the State.

(4) The General Assembly shall, by general law uniformly applicable in every local court district of the State, prescribe the jurisdiction of the District Courts and Magistrates.

...

(6) The General Assembly shall by general law provide a proper system of appeals.

N.C. Const. art. IV, § 12(3)-(4) & (6).

Thus, on the face of the relevant constitutional provisions alone, the General Assembly has acted within its constitutional authority by enacting the challenged statutes that prescribe the jurisdiction of the district and superior courts, and provide a system of appeal from district to superior court. This statutory mechanism governs the “procedure or practice” for implied-consent offenses in the trial courts of this State, as the General Assembly is constitutionally authorized to do by article IV, section 13. Accordingly, we hold that the superior court erred by ruling that the challenged statutes violate the separation of powers provision of the North Carolina Constitution.

In sum, *Fowler* forecloses any argument that the challenged statutes violate a defendant’s substantive due process, procedural due process, or equal protection rights. Further, the challenged statutes are within the General Assembly’s constitutional power to make rules of practice and procedure in the district and superior courts, and to provide a system of appeals between those courts; accordingly, we hold that the challenged statutes do not violate the separation of powers provision of our constitution.

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[200 N.C. App. 433 (2009)]

Reversed.

Judges STROUD and BEASLEY concur.

STATE OF NORTH CAROLINA v. NICHOLAS MICHAEL RACKLEY

No. COA09-15

(Filed 20 October 2009)

Appeal and Error—interlocutory orders—driving while impaired—superior court agreement with district court indication

The Court of Appeals dismissed as interlocutory the State's appeal from a superior court's oral decision indicating its agreement with the district court's pretrial indication of dismissal of a driving while impaired prosecution.

Appeal by the State of North Carolina from an oral decision rendered 11 July 2008 by Judge John E. Nobles in Pitt County Superior Court. Heard in the Court of Appeals 10 June 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jess D. Mekeel, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellee.

JACKSON, Judge.

From the superior court's oral decision indicating its agreement with the district court's pre-trial indication pursuant to North Carolina General Statutes, section 20-38.6(f), the State appeals. For the reasons stated below, we dismiss.

On 11 May 2007, at approximately 1:24 a.m., Officer S. Styron ("Officer Styron") arrested Nicholas Michael Rackley ("defendant") and charged him for the offense of driving while impaired. On 18 March 2008, defendant filed a pretrial motion to dismiss in Pitt County District Court. On 15 April 2008, the Honorable Charles M. Vincent, District Court Judge Presiding ("Judge Vincent") made a preliminary determination pursuant to North Carolina General Statutes,

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[200 N.C. App. 433 (2009)]

section 20-38.6(f) to grant defendant's motion. On 9 July 2008, Judge Vincent's order was reduced to writing and filed *nunc pro tunc* 15 April 2008.

On 23 April 2008, pursuant to North Carolina General Statutes, section 20-38.7(a), the State appealed Judge Vincent's order to Pitt County Superior Court, and on 11 July 2008, the matter came on for hearing before the Honorable John E. Nobles, Superior Court Judge presiding ("Judge Nobles"). By oral decision at the conclusion of the hearing, Judge Nobles stated his agreement with Judge Vincent's pretrial indication and incorporated the district court's findings of fact and conclusions of law. On 23 July 2008, the State appealed to this Court.

On appeal, the State asserts that its appeal properly lies with this Court pursuant to North Carolina General Statutes, section 20-38.7(a) read *in pari materia* with section 15A-1432(e). We disagree.

For the reasons set forth in *State v. Fowler*, 197 N.C. App. 1, 6-7, 676 S.E.2d 523, 532 (2009), we dismiss the State's appeal as interlocutory. *See also State v. Palmer*, 197 N.C. App. 201, 203, 676 S.E.2d 559, 561 (2009) (citing *Fowler*, 197 N.C. App. at 11-12, 676 S.E.2d at 535). Because we dismiss the State's appeal as interlocutory, the issues presented by defendant's motion and whether the trial court properly ruled upon defendant's motion are matters not properly before us at this time. *See Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931) ("It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter.") (citations omitted). Notwithstanding that the instant appeal was filed prior to our decisions in *Fowler* and *Palmer*, in order to give immediate effect to our analysis in those opinions, we decline to issue a writ of *certiorari* pursuant to North Carolina Rules of Appellate Procedure, Rule 21 to address the merits of the State's appeal. *See N.C. R. App. P. 21* (2007).

Dismissed.

Judges McGEE and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 OCTOBER 2009)

BAKER CONSTR. v. CITY OF BURLINGTON No. 09-13	Alamance (08CVS1897)	Affirmed
DRAKE v. ASTI No. 08-1537	Union (08CVS2215)	Reversed and Remanded
IN RE S.A.J. No. 09-339	McDowell (06JB108)	Vacated
IN RE: C.E.L.P. No. 09-775	Wilkes (07JT201)	Affirmed
IN RE: I.N.B., T.N.B., D.N.B. No. 09-742	Robeson (07JA9) (07JA10) (07JA8)	Reversed and re- manded for a new hearing
IN RE: W.L.A. AND O.C.A. No. 09-628	Graham (08JT10) (08JT9)	Reversed
IN RE B.M.J. No. 09-726	Henderson (00JT81)	Affirmed
IN RE E.J.T. No. 09-562	Johnston (07J192)	Reversed and Remanded
IN RE H.R.H. No. 09-793	Catawba (07JT83)	Affirmed
IN RE J.J. No. 09-649	Guilford (08JA724)	Affirmed
IN RE J.K.B. No. 09-580	Buncombe (07JA388)	Remanded in part, affirmed in part
IN RE M.N.N.G. No. 09-697	Guilford (06JT117) (06JT118) (06JT116) (06JT575)	Affirmed
LANKFORD v. DREAMS UNLIMITED, INC. No. 09-89	Indus. Comm. (IC188955)	Affirmed
LEXINGTON FURN. v. FURNCO INT'L No. 09-265	Guilford (08CVS2562)	Reversed and remanded

PETERS v. ONSLOW COUNTY SCHOOL DISTRICT No. 09-259	Indus. Comm. (IC631658)	Affirmed
STATE v. ALEEM No. 09-425	Alamance (08CRS50453) (08CRS50452)	No Error
STATE v. BLACK No. 09-330	Edgecombe (07CRS52431)	Reversed
STATE v. BUSIAS No. 09-322	Onslow (08CRS51619)	No Error
STATE v. BUTLER No. 09-551	Mecklenburg (08CRS202517)	No Error
STATE v. DOWNEY No. 09-61	Rowan (05CRS54090) (05CRS54457) (05CRS54089)	No Error
STATE v. HUGHES No. 09-550	Davidson (07CRS53994)	No Error
STATE v. OLIVER No. 09-106	Buncombe (07CRS60388)	No Error
STATE v. PAULEY No. 09-364	Mecklenburg (07CRS233536) (07CRS233542) (07CRS233537) (07CRS48600) (07CRS233540)	No Error
STATE v. SNEED No. 09-367	Franklin (06CRS51295)	Affirmed
STATE v. VALENTINE No. 09-261	Vance (07CRS799) (06CRS54685)	No error, in part; Vacated and re- manded, in part
STATE v. WILLIAMS No. 09-309	Cleveland (06CRS57804)	Dismissed
STATE v. WILLIAMS No. 09-463	New Hanover (08CRS50158)	Affirmed in part, re- manded in part for correction of clerical error
THOMAS v. THOMAS No. 08-1008	Wake (00CVD10157)	Affirmed in part, dis- missed in part, va- cated and remanded in part

STATE v. MELLO

[200 N.C. App. 437 (2009)]

STATE OF NORTH CAROLINA v. GARY FRANCES MELLO

No. COA08-1052

(Filed 3 November 2009)

1. Search and Seizure— investigatory stop of vehicle—findings—evidence supporting

There was sufficient evidence in a narcotics prosecution to support the findings made by the trial court when upholding an investigatory stop of defendant's vehicle.

2. Search and Seizure— investigatory stop—reasonable suspicion

The trial court in a narcotics prosecution correctly concluded that an officer had reasonable suspicion for an investigatory stop of defendant's vehicle.

Judge HUNTER, JR., Robert N., dissenting.

Appeal by defendant from order entered 26 September 2007 by Judge Steve A. Balog and judgment entered 10 December 2007 by Judge V. Bradford Long in Forsyth County Superior Court. Heard in the Court of Appeals 7 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Glover & Peterson, P.A., by James R. Glover, for Defendant.

ERVIN, Judge.

On appeal, Gary Frances Mello (Defendant) challenges the order entered by Judge Steve A. Balog (trial court) on 26 September 2007 denying his motion to suppress evidence seized during a traffic stop. For reasons set forth below, we find no error.

Factual Background

By 26 August 2006, Officer J.R. Pritchard had been employed by the Winston-Salem Police Department for about two and a half years. After completing Basic Law Enforcement Training, Officer Pritchard had received training in making drug arrests that included participating in numerous investigations with training officers. Officer Pritchard had made many arrests for drug violations and had conducted drug surveillance activities.

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[200 N.C. App. 437 (2009)]

At approximately 10:30 a.m. on 26 August 2006, Officer Pritchard was patrolling the area of Chandler and Amanda Place when he observed a vehicle driven by Defendant stop about fifteen to twenty yards away. At that time, Officer Pritchard watched “two other individuals approach the vehicle putting their hands into the vehicle;” however, he did not see any exchange or transfer of money. Officer Pritchard had not previously seen Defendant, but he recognized the two men standing outside the vehicle. He did not, however, know their names or whether he had previously arrested them. Officer Pritchard characterized the area of Chandler and Amanda Place as “a very well-known drug location” where he had previously made drug-related arrests.

Based on his observation of the interaction between Defendant and the two individuals who approached his vehicle, Officer Pritchard suspected that he had witnessed a “drug transaction,” something he had seen on numerous prior occasions. After seeing the episode at Defendant’s automobile, Officer Pritchard drove a short distance before turning around. At that point, the two individuals fled the area, with one of them quickly entering a house. In addition, Defendant started driving away from the area in the opposite direction from that in which Officer Pritchard was traveling. According to Officer Pritchard, Defendant did not commit any traffic offense as he attempted to drive away. Officer Pritchard turned around again and stopped Defendant’s vehicle. Defendant pulled over about a quarter of a mile after Officer Pritchard activated his blue light.

After he stopped Defendant’s vehicle, Officer Pritchard approached the automobile and ascertained that Defendant was in the driver’s seat and that there was a passenger named Robin Laughlin in the passenger seat. As he began to converse with Defendant, Officer Pritchard noticed that Defendant was clutching a white, rocklike substance. Defendant threw the substance to the floor. Subsequent testing revealed the substance to be .2 grams of cocaine base. In addition, Officer Pritchard recovered what he believed to be a crack pipe from Defendant’s vehicle.

Procedural History

On 26 August 2006, a Magistrate’s Order was issued charging Defendant with felonious possession of cocaine and possession of drug paraphernalia. On 26 February 2007, the Forsyth County grand jury returned a bill of indictment charging Defendant with felonious possession of cocaine and possession of drug paraphernalia.

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[200 N.C. App. 437 (2009)]

On 16 April 2007, Defendant filed a motion to suppress the evidence obtained from his traffic stop on 26 August 2006. A hearing on Defendant's suppression motion was held on 31 August 2007. On 26 September 2007, the trial court entered an order denying Defendant's suppression motion.

On 10 December 2007, Defendant entered a plea of guilty to felonious possession of cocaine and possession of drug paraphernalia before Judge Long. Before entering his guilty plea, Defendant reserved the right to appeal the denial of his suppression motion to this Court. Based upon his guilty plea, Judge Long determined that Defendant was a Level III offender given that he had accumulated 5 prior record level points, that Defendant should be sentenced in the presumptive range, and that the two offenses for which Defendant had pled guilty should be consolidated for judgment. After Defendant declined a probationary sentence, Judge Long ordered that Defendant be imprisoned for a minimum term of 5 months and a maximum term of 6 months imprisonment in the custody of the North Carolina Department of Correction. Defendant gave notice of appeal to this Court from the judgment entered by Judge Long.

Analysis

In his only challenge to his convictions and sentence, Defendant asserts that Officer Pritchard lacked the reasonable suspicion of criminal activity needed to conduct a valid investigatory stop of his vehicle on 26 August 2006 so that the trial court erred in denying his motion to suppress the evidence seized as a result of that stop. After carefully examining the trial court's order denying Defendant's motion to suppress in light of the evidentiary record and the applicable law, we disagree.

"[T]he scope of appellate review of [a denial of a motion to suppress] is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). A trial court's factual findings are binding on appeal "if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citations omitted). We review the trial court's conclusions of law *de novo*. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648, *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007). Based on this standard of review, we turn our attention to the

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findings of fact and conclusions of law contained in the trial court's order denying Defendant's motion to suppress.

In denying Defendant's suppression motion, the trial court made the following findings of fact:

1. Officer J[.] R[.] Pritchard has been an officer in the Winston-Salem Police Department for 3.5 years.
2. Officer Pritchard has had training in drug arrests and surveillance of drug activity.
3. Officer Pritchard has made numerous drug arrests.
4. Officer Pritchard has, in his duties, regularly patrolled the area of Chandler and Amanda Place.
5. Officer Pritchard has made drug arrests at Chandler and Amanda Place and has assisted other officers in making drug arrests at Chandler and Amanda Place, as well.
6. On August 26, 2006, Officer Pritchard was on duty and routine patrol in the area of Chandler and Amanda Place.
7. From training and experience, Officer Pritchard knew the area of Chandler and Amanda Place to be a well known drug location with high drug activity.
8. On August 26, 2006[.] at 10:30 a[.]m[.], Officer Pritchard drove by a motor vehicle operated by the Defendant. Officer Pritchard passed within 15-20 yards of the Defendant, traveling 10-15 MPH.
9. Officer Pritchard observed Defendant's vehicle stationary on Amanda Place, and saw two individuals on foot approach the driver's side of the Defendant's vehicle where the Defendant was located.
10. The two individuals inserted their hands into the Defendant's vehicle. Officer Pritchard did not see any object or money in their hands, nor did he observe any direct exchange between the individuals and the Defendant or any other persons in the car.
11. After brief contact, these individuals left the Defendant's car.
12. Officer Pritchard had not seen the Defendant before. He had seen the two pedestrians before. Their faces were familiar, but he did not know their names.

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13. Officer Pritchard suspected it was a drug transaction in which the Defendant had been involved and had observed numerous similar drug transactions in the past.
14. Officer Pritchard turned his car around and saw the two individuals on foot flee the area, one going into a nearby house.
15. As Officer Pritchard came back down the street, he observed the Defendant moving in the opposite direction. Officer Pritchard initiated a traffic stop of the Defendant.
16. Officer Pritchard did not suspect that Defendant had committed any traffic violations.
17. After stopping the Defendant and making contact, Officer Pritchard seized the objects that are the subject of the Defendant's motion to suppress.

Based on these findings of fact, the trial court concluded as a matter of law that, "[u]nder the totality of the circumstances, Officer Pritchard had reasonable suspicion based on articulable facts that to an officer of his experience and training would lead him to believe that the Defendant was involved in a drug transaction and was therefore justified in making an investigatory stop of the Defendant's vehicle." In light of these findings of fact and conclusions of law, the trial court denied Defendant's motion to suppress.

Sufficiency of the Evidence to Support the Findings of Fact

[1] First, Defendant challenges the sufficiency of the evidentiary support for Findings of Fact Nos. 13 and 14, which provide that:

13. Officer Pritchard suspected it was a drug transaction in which the Defendant had been involved and had observed numerous similar drug transactions in the past.
14. Officer Pritchard turned his car around and saw the two individuals on foot flee the area, one going into a nearby house.

As a result, the first issue that we must address is the extent, if any, to which the challenged findings of fact are supported by competent evidence in the record.

The essential thrust of Finding of Fact No. 13 is that Officer Pritchard suspected that the interaction between Defendant and the two men that approached his vehicle on foot was a drug transaction

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and that he had observed drug transactions on other occasions. At the suppression hearing, Officer Pritchard testified as follows:

Q: What, if anything, brought your attention to the defendant, Officer?

A: I observed the vehicle that had pulled down into the area of Amanda Place. I observed two other individuals approach the vehicle putting their hands into the vehicle, which is what I observed to be a suspected drug—

MR. JAMES: Objection

THE COURT: Overruled.

A: Which is what I observed to be a suspected drug transaction. *I've observed numerous transactions very similar to the way that it took place.*

As a result, Officer Pritchard's testimony provides sufficient evidentiary support for Finding of Fact No. 13.

Similarly, the essential thrust of Finding of Fact No. 14 is that Officer Pritchard observed the two individuals who had approached Defendant's vehicle flee the area. The dictionary defines to "flee" as "[t]o run away, as from trouble or danger." *American Heritage Dictionary of the English Language* 519 (3rd ed. 1997). According to Defendant, the fact that Officer Pritchard observed the two individuals quickly leaving the area, with one ducking into a nearby house, is not evidence of flight. Officer Pritchard testified at the suppression hearing that he "observed both of the two individuals who had been at the vehicle fleeing from the area." The appellate courts in this jurisdiction have allowed witnesses to testify that individuals were "fleeing" or "in flight" under the rubric of a "shorthand statement of fact," see *State v. Moore*, 301 N.C. 262, 271, 271 S.E.2d 242, 247-48 (1980), *overruled on other grounds*, *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986) (stating that "this Court has long held that a witness may state 'the instantaneous conclusions of the mind as to the appearance, condition, or physical or mental state of persons, animals, or things, derived from the observation of a variety of facts presented to the senses at one and the same time' ") (quoting *State v. Spaulding*, 298 N.C. 397, 411, 219 S.E.2d 178, 187 (1975)), so this portion of Officer Pritchard's testimony was clearly competent and supported the challenged factual finding. As a result, Officer Pritchard's testimony provides ample support for the trial court's conclusion that the

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two individuals that approached Defendant's vehicle fled when Officer Pritchard turned his patrol vehicle around.

Thus, the only two findings of fact that Defendant has challenged on appeal have adequate evidentiary support. For that reason, all of the trial court's factual findings must be deemed true for the purpose of analyzing the appropriateness of the trial court's conclusions of law.

Reasonable Suspicion

[2] Finally, Defendant challenges the trial court's conclusion of law that:

Under the totality of the circumstances, Officer Pritchard had reasonable suspicion based on articulable facts that to an officer of his experience and training would lead him to believe that the Defendant was involved in a drug transaction and was therefore justified in making an investigatory stop of the Defendant's vehicle.

According to Defendant, the trial court's findings of fact did not support its conclusion that Officer Pritchard had a reasonable suspicion to believe that defendant was involved in a drug transaction. In other words, Defendant contends that, even accepting the trial court's findings of fact as valid, those factual findings demonstrate that Officer Pritchard did not have the necessary reasonable suspicion to justify stopping Defendant's vehicle on 26 August 2006.

"An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.'" *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). "*Terry v. Ohio* and its progeny have taught us that in order to conduct a warrantless, investigatory stop, an officer must have a reasonable and articulable suspicion of criminal activity." *State v. Hughes*, 353 N.C. 200, 206-07, 539 S.E.2d 625, 630 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968)).

A court must consider "the totality of the circumstances—the whole picture" [—] in determining whether a reasonable suspicion to make an investigatory stop exists. *U.S. v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981). The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a

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reasonable, cautious officer, guided by his experience and training. *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906; *State v. Thompson*, 296 N.C. 700, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979). The only requirement is a minimal level of objective justification, something more than an “unparticularized suspicion or hunch.” *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989).

Watkins, 337 N.C. at 441-42, 446 S.E.2d at 70. As a result, the ultimate issue before the trial court in a case involving the validity of an investigatory detention is the extent to which the investigating officer has a reasonable articulable suspicion that the defendant might be engaged in criminal activity.

The Supreme Court held that an investigatory detention was appropriate on the basis of a remarkably similar set of facts in *State v. Butler*, 331 N.C. 227, 415 S.E.2d 719 (1992). In *Butler*, the defendant sought the suppression of evidence relating to his purchase of a .12 gauge shotgun from a Fayetteville pawnshop and statements he made to Officer Ernesto Hedges of the Tampa, Florida, Police Department. The Supreme Court described the facts on which it based its decision as follows:

Officer Hedges obtained the gun purchase receipt and the statements on 11 October 1989 while on patrol as a uniformed officer assigned to a speciality drug unit in Tampa. Hedges and his partner saw defendant, an unfamiliar figure, standing with a group of people on a Tampa street corner known as a “drug hole,” an area frequented by drug dealers and users. Hedges had had the area under daily surveillance for several months. In the past six months, Hedges had made four to six arrests at the corner and knew that other arrests had occurred there. As Hedges and his partner approached the group, defendant and the officers made eye contact, at which point defendant immediately turned and walked away.

Their suspicions raised, the officers followed defendant and asked him for identification. Defendant handed Hedges a Florida driver’s license. Before Hedges accepted the identification, he frisked defendant’s person. Hedges testified that he conducted the frisk in order to discover any weapons and for his own protection during the face-to-face encounter with a person he suspected of drug activity.

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Id., 331 N.C. at 231-32, 415 S.E.2d at 721. After ascertaining that the defendant was wanted for murder in North Carolina, Officer Hedges placed him under arrest. The Supreme Court held that the investigatory detention at issue in *Butler* did not run afoul of the state and federal constitutional protections against unreasonable searches and seizures. According to the Supreme Court:

In determining whether the *Terry* standard is met, we must consider Hedges' actions in light of the totality of the circumstances. *Rinck*, 303 N.C. at 559, 280 S.E.2d at 919; *Streeter*, 282 N.C. at 210, 195 S.E.2d at 506. Those circumstances are: 1) defendant was seen in the midst of a group of people congregated together on a corner known as a "drug hole;" 2) Hedges had had the corner under daily surveillance for several months; 3) Hedges knew this corner to be a center of drug activity because he had made four to six drug-related arrests there in the past six months; 4) Hedges was aware of other arrests there as well; 5) defendant was a stranger to the officers; 6) upon making eye contact with the uniformed officers, defendant immediately moved away, behavior that is evidence of flight; and 7) it was Hedges' experience that people involved in drug traffic are often armed.

While no one of these circumstances alone necessarily satisfies Fourth Amendment requirements, we hold that, when considered in their totality, Officer Hedges had sufficient suspicion to make a lawful stop. Hedges observed defendant not simply in a general high crime area, but on a specific corner known for drug activity and as the scene of recent, multiple drug-related arrests. *See United States v. Rickus*, 737 F.2d 360, 365 (3d Cir. 1984) (presence of defendants in area that recently experienced "a spate of burglaries"); *United States v. Magda*, 547 F.2d 756, 758-59 (2d Cir. 1976) (two suspects observed one hundred feet west of a park which was under twenty-four hour surveillance for drug activity), *cert. denied*, 434 U.S. 878, 54 L. Ed. 2d 157 (1977). The United States Supreme Court has held that mere presence in a neighborhood frequented by drug users is not, standing alone, a basis for concluding that the defendant was himself engaged in criminal activity. *Brown v. Texas*, 443 U.S. 47, 52, 61 L. Ed. 2d 357, 362-63 (1979). Here, however, there was an additional circumstance—defendant's immediately leaving the corner and walking away from the officers after making eye contact with them. *See United States v. Jones*, 619 F.2d 494, 494 (5th Cir. 1980) (individual's flight from uniformed law enforcement officer may be a fact used

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to support reasonable suspicion “that criminal activity is afoot”); *Magda*, 547 F.2d at 758-59 (defendant’s companion immediately moved away with a “rapid motion” after looking in direction of observing officer); *State v. Belton*, 441 So. 2d 1195, 1198 (La. 1983) (flight, nervousness, or a startled look at the sight of an officer may be a factor leading to reasonable suspicion), *cert. denied*, 466 U.S. 953, 80 L. Ed. 2d 543 (1984).

Id., 331 N.C. at 233-34, 415 S.E.2d at 722-23; *See also State v. I.R.T.*, 184 N.C. App. 579, 585-86, 647 S.E.2d 129, 134-35 (2007) (holding that the officer had reasonable grounds to conduct an investigatory detention where a juvenile in a high drug area started walking away upon the approach of a law enforcement officer while keeping his head turned away from the officer and while moving his mouth as if he had something in it); *State v. Crenshaw*, 144 N.C. App. 574, 578-79, 551 S.E.2d 147, 149-50 (2001) (stating that the officer had reasonable grounds to frisk defendant “based upon the officers’ familiarity with defendant, defendant’s presence in a specific area known for drug activity, and defendant’s having been illegally parked”); *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997) (stating that “[t]he *Butler* Court held that, when an individual’s presence at a suspected drug area is coupled with evasive action, police may form, from those actions, the quantum of reasonable suspicion necessary to conduct an investigatory stop”); *State v. Watson*, 119 N.C. App. 395, 397-99, 458 S.E.2d 519, 521-23 (1995) (holding that officer had reasonable grounds to suspect criminal activity when a defendant with a history of drug involvement, while in an area in which numerous drug arrests had been made, attempted to enter a convenience store and to swallow the drugs in his possession upon the approach of law enforcement officers). The remarkable similarity between the facts at issue here and the facts at issue in *Butler* requires us to begin our analysis of the legal issues that are raised by Defendant’s challenge to the trial court’s order denying his suppression motion by examining those similarities.

A careful review of the record indicates that all of the features that led the Supreme Court to uphold the investigative detention at issue in *Butler* are present in this case as well. At bottom, Defendant voluntarily entered a drug-ridden area, comparable to the one in which Officer Hedges found the defendant in *Butler*. While in the area, two individuals approached Defendant’s car and inserted their hands into the interior of the vehicle. After Officer Pritchard became suspicious and approached Defendant and the two pedestrians, the

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two pedestrians fled and Defendant began to drive off. In the same manner, the defendant in *Butler* attempted to walk away after making eye contact with Officer Hedges. Under the analysis adopted by the Supreme Court in *Butler*, this combination of presence in an area known to be a center of drug-related activity coupled with evasive action on the part of individuals involved in some sort of interaction with Defendant is sufficient to support a conclusion that Officer Pritchard had the “reasonable articulable suspicion” necessary to support an investigative detention. In fact, having seen the two pedestrians approach Defendant’s vehicle and insert their hands into it, an action which the trial court found to have the appearance of a hand-to-hand drug transaction, Officer Pritchard actually had more of a basis for suspecting that criminal activity was afoot in this instance than Officer Hedges had for suspecting that something was amiss in *Butler*. *State v. Summey*, 150 N.C. App. 662, 667, 564 S.E.2d 624, 628 (2002) (holding that an officer’s belief that he had observed the occupants of a truck participate in a drug transaction supported a valid investigatory detention of the truck and its occupants); *State v. Clyburn*, 120 N.C. App. 377, 380-81, 462 S.E.2d 538, 540-41 (1995) (holding that an officer’s reasonable belief that he had witnessed a hand-to-hand drug transaction helped provide a “reasonable suspicion to make an investigatory stop of defendant’s vehicle”). Thus, since the Supreme Court’s decision in *Butler* is binding on this Court and since we are not persuaded that *Butler* can be distinguished from this case in any meaningful way, we do not believe that *Butler* leaves us with any alternative except to affirm the trial court’s order denying Defendant’s suppression motion.

The dissent, after noting our reliance on *Butler* and summarizing the facts of and decision in that case, attempts to distinguish this case from *Butler* on a number of different grounds. However, none of the bases upon which the dissent attempts to distinguish this case from *Butler* are persuasive.

First, the dissent appears to challenge the conclusion that the investigatory detention of Defendant took place in a drug-ridden area. In making this argument, the dissent contends that Officer Pritchard “based his opinion” that “ ‘the area of Chandler and Amanda Place’ was ‘a well-known drug location’ ” “on the fact that he had made and assisted in other drug arrests in the same area during his two and a half years with the Winston-Salem Police Department;” that “he did not know the specific number of arrests made;” and that Officer Pritchard was “assigned to an adjoining beat” rather than to the

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Chandler and Amanda Place area “at the time.”¹ Put another way, the first argument advanced in the dissent tends to suggest that the area around Chandler and Amanda Place was not a drug-ridden area to the same extent as that in which the investigatory detention at issue in *Butler* occurred. However, the trial court determined, in a finding of fact that Defendant has not challenged on appeal and which is, for that reason, binding on us for purposes of appellate review, *State v. Fuller*, — N.C. App. —, —, 674 S.E.2d 824, 829 (2009) (stating that “where, as here, the defendant does not challenge the findings of fact on appeal, they are binding, and the only question before this Court is whether those findings support the trial court’s conclusions”) (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982); *State v. Cooper*, 186 N.C. App. 100, 103, 649 S.E.2d 664, 666 (2007), *disc. review denied*, 361 N.C. 698, 666 S.E.2d 761 (2008)), that Officer Pritchard “knew the area of Chandler and Amanda Place to be a well known drug location with a high drug activity.” Thus, given the trial court’s finding that Officer Pritchard “knew the area of Chandler and Amanda Place to be a well known drug location with a high drug activity,” the first basis upon which the dissent attempts to distinguish *Butler* is not persuasive.

Secondly, the dissent points out that, “as to the alleged transaction, Officer Pritchard did not see any exchange.” Although the dissent suggests that this factor, along with others, serves to “render *Butler* inapplicable to this appeal,” we do not agree. The existence of evidence tending to suggest, as the trial court found, that a hand-to-hand drug transaction had occurred in Officer Pritchard’s presence makes the case for an investigatory detention here stronger than the one before the Court in *Butler*, since there was no evidence that Officer Hedges had witnessed such an unlawful act prior to initiating

1. The dissent also emphasizes that, unlike the situation in *Butler*, “Officer Pritchard did not have the area in question under daily surveillance,” “was not patrolling the exact location of Chandler and Amanda Place on a regular basis at the time of defendant’s arrest, [and] defendant was not congregated with a group of suspected drug offenders under daily police scrutiny.” As we read *Butler*, none of the facts upon which this component of the dissent’s argument is based are in any way essential to the holding in *Butler*. Instead, as we previously noted, the essential holding in *Butler* is that, “when an individual’s presence in a suspected drug area is coupled with evasive action, police may form, from those actions, the quantum of reasonable suspicion necessary to conduct an investigatory stop.” *Willis*, 125 N.C. App. at 542, 481 S.E.2d at 411. Thus, whether the area in question was under daily surveillance, the extent to which the investigating officer had personally had the area in question under surveillance, and the number of individuals present in the area under surveillance are not critical to the result reached in *Butler*.

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the investigatory detention at issue there.² Thus, the fact that Officer Pritchard did not actually witness an exchange between Defendant and the two individuals that approached his vehicle, while certainly making this case different from *Butler*, does not do so in such a manner as to suggest that the trial court erred by finding that the investigatory detention of Defendant resulted in a violation of his federal and state constitutional protections against unreasonable searches and seizures.

The dissent also notes that “defendant made no suspicious movements upon the police cruiser turning toward him.” The fact that the trial court found that the two pedestrians, rather than Defendant, fled from the scene does not strike us as a valid basis upon which to distinguish this case from *Butler*.³ We do not dispute the fact that merely leaving a drug-ridden area in a normal manner is not sufficient to justify an investigatory detention. See *In re J.L.B.M.*, 176 N.C. App. 613, 619-22, 627 S.E.2d 239, 243-45 (2006) (holding that information that a suspicious person wearing baggy clothes had been seen in a drug-ridden area and that he walked away upon the approach of law enforcement officers did not suffice to support an investigatory detention); *State v. Roberts*, 142 N.C. App. 424, 430, ftm. 2, 542 S.E.2d 703, 708, ftm. 2 (2001) (stating that “evidence that Defendant walked away from Miller after he asked Defendant to stop is not evidence that Defendant was attempting to flee from Miller and, thus, indicates nothing more than Defendant’s refusal to cooperate”); *State v. Rhyne*, 124 N.C. App. 84, 89-91, 478 S.E.2d 789, 791-93 (1996) (holding that an officer lacked reasonable suspicion to frisk a defendant who was sit-

2. The dissent appears to contend in connection with this aspect of its argument that our reliance on *Summey*, 150 N.C. App. 662, 564 S.E.2d 624, and *Clyburn*, 120 N.C. App. 377, 462 S.E.2d 538, is misplaced on the grounds that those decisions are distinguishable from the present case on their facts. However, despite the existence of immaterial factual differences between this case on the one hand and *Summey* and *Clyburn* on the other, a careful analysis of the facts in *Summey* and *Clyburn* shows that the investigating officers did not actually see an exchange take place in either of these cases and that this Court still found that the events which led investigating officers to believe that drug transactions had occurred in their presence sufficed to justify investigatory detentions. The same logic suffices to support upholding the investigative detention at issue here given the trial court’s unchallenged finding that “Officer Pritchard” “had observed numerous similar drug transactions in the past” and “suspected it was a drug transaction in which the Defendant had been involved.”

3. Similarly, the fact that the events at issue in *Magda* did not coincide with the events at issue in *Butler* should not obscure the fact that the *Butler* Court cited *Magda* as a key point in its legal analysis, thus indicating that evasive action by third persons can serve the same purpose as flight by the defendant in terms of providing adequate justification for an investigatory detention.

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ting in an area known to be a center of drug activity without taking evasive action or otherwise engaging in suspicious conduct); *State v. Fleming*, 106 N.C. App. 165, 170-71, 415 S.E.2d 782, 785 (1992) (holding that the fact that defendant was standing in an open area between two apartment buildings and walked away upon the approach of law enforcement officers did not justify an investigatory detention). However, the trial court's findings disclose the existence of an entirely different situation here than that addressed in these decisions. According to the trial court's findings, the two pedestrians who inserted their hands into Defendant's vehicle took evasive action of the type that supported a finding of reasonable suspicion in *Butler* upon observing Officer Pritchard's approach. The fact that the evasive action was taken by the two pedestrians, rather than Defendant, in the immediate aftermath of their encounter with Defendant created a reasonable basis, given the facts of this case, for believing that all three of these individuals were engaged in criminal activity that justified further investigative activity by Officer Pritchard. After all, the issue is not whether Defendant, and Defendant alone, did something that created a reasonable suspicion on the part of Officer Pritchard; instead, the issue is whether, viewed in their totality, the surrounding circumstances created a reasonable suspicion on the part of Officer Pritchard that Defendant might be involved in criminal activity. *Watkins*, 337 N.C. at 441, 446 S.E.2d 70. Although the necessary reasonable suspicion can be created by the suspect's own conduct, there are reported cases, including the *Magda* decision cited by the Supreme Court in *Butler*, 331 N.C. at 234, 415 S.E.2d at 723, in which reviewing courts have considered the conduct of third parties to be relevant to the "reasonable articulable suspicion" inquiry as well. See *United States v. Soto-Cervantes*, 138 F.3d 1319, 1322-23 (10th Cir. 1998) (holding that the fact that a member of a group of men other than the defendant jumped over a wall and hid something upon the arrival of law enforcement officers was relevant to the "reasonable suspicion" inquiry); *Magda*, 547 F.2d at 758-59 (stating that the fact that defendant's companion rapidly moved away after looking in an observing officer's direction was relevant to a "reasonable suspicion" determination); *Commonwealth v. Moses*, 408 Mass. 136, 142, 557 N.E.2d 14, 15-18 (1990) (holding that the fact that a group of men surrounding a car parked in a marked bus stop dispersed upon the approach of investigating officers was relevant to a "reasonable suspicion" determination). The fact that the two pedestrians fled in the immediate aftermath of an interaction with Defendant that could be reasonably construed as a hand-to-hand drug transaction which

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took place in “a well known drug location with high drug activity” would clearly have raised a reasonable suspicion in the mind of a competent and experienced law enforcement officer that further investigation was warranted; the fact that Defendant did not drive away at a high rate of speed or take some other obvious evasive action himself does not change that fact. The federal and state constitutions do not, under existing decisional authority, require more in order for a valid investigatory detention to take place.

As a result, the facts of this case as set out in the trial court’s findings of fact cannot be distinguished on any material basis from those that the Supreme Court found to be sufficient to justify an investigatory stop in *Butler*. For that reason, we are compelled by existing Supreme Court precedent to conclude that the trial court’s findings of fact amply supported its conclusion that Officer Pritchard had an adequate basis for conducting an investigatory detention of Defendant on 26 August 2006.

Conclusion

For the reasons set forth above, we find no error in the trial court’s order denying Defendant’s motion to suppress. Thus, we further conclude that Defendant’s guilty pleas and the resulting judgment entered by Judge Long should remain undisturbed.

NO ERROR.

Judges JACKSON concurs.

Judge HUNTER, Jr. dissents by separate opinion.

HUNTER, JR., Robert N., Judge, dissenting.

The facts of this case present either the pinnacle of a “hunch” or the absolute minimum threshold for “reasonable suspicion.” The former will not support the initial traffic stop of defendant’s vehicle in this case, while the latter will shower the investigatory stop in issue with all the riches and blessings accompanying a determination that a suspicion was “reasonable” under the United States and North Carolina Constitutions. In my opinion, Officer Pritchard’s testimony shows that he had a “hunch” or “a strong intuitive feeling or a premonition,” *The American Heritage College Dictionary* 663 (3d ed. 1997), as opposed to a “particularized and objective” suspicion that a drug transaction had taken place. *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981). Accordingly, I dissent.

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Citizens in this country are protected against “unreasonable searches and seizures” by the Fourth Amendment of the United States Constitution. U.S. Const. amend. IV; *Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090, *reh’g denied*, 368 U.S. 871, 7 L. Ed. 2d 72 (1961) (Fourth Amendment applicable to states through Fourteenth Amendment). Investigatory stops as authorized by *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968) are constitutional under the Fourth Amendment as long as the officer initiating the stop has a “particularized and objective basis for suspecting the particular person stopped of criminal activity.” *Cortez*, 449 U.S. at 417-18, 66 L. Ed. 2d at 629. This standard under *Terry*, also known as “reasonable suspicion,” “is dependent upon both the content of information possessed by police and its degree of reliability.” *Alabama v. White*, 496 U.S. 325, 330, 110 L. Ed. 2d 301, 309 (1990).

When reviewing the facts and information presented to an officer leading to a *Terry* stop, we must examine the “totality of the circumstances.” *United States v. Sokolow*, 490 U.S. 1, 8, 104 L. Ed. 2d 1, 10 (1989). This requires us to examine two elements: (1) whether a trained officer’s assessment to make a stop was “based upon all the circumstances” including “objective observations” of “the modes or patterns of operation of certain kinds of lawbreakers”; and (2) whether the officer’s assessment in light of his training “[raised] a suspicion that the particular individual being stopped is engaged in wrongdoing.” *Cortez*, 449 U.S. at 418, 66 L. Ed. 2d at 629. Under these guiding principles, we must determine whether “[t]he stop [is] based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.” *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citations omitted). “The only requirement is a minimal level of objective justification, something more than an ‘unparticularized suspicion or hunch.’ ” *Id.* at 442, 446 S.E.2d at 70 (quoting *Sokolow*, 490 U.S. at 7, 104 L. Ed. 2d at 10).

Under the “totality of the circumstances” test, we consider several factors on the part of the accused including a suspect’s nervousness or activity at an unusual hour. *See State v. McClendon*, 350 N.C. 630, 639, 517 S.E.2d 128, 133 (1999) (concluding that the circumstances gave rise to a reasonable suspicion because the defendant was fidgeting, sweating, breathing rapidly, and avoiding eye contact); *Watkins*, 337 N.C. at 443, 446 S.E.2d at 70-71 (holding that the police officer had reasonable suspicion when he saw a vehicle moving with

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its lights off in the parking lot of a closed business in a rural area at 3:00 a.m.). We also take into account a defendant's presence in a high-crime area or whether the defendant engages in unprovoked flight. *Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 576 (2000). "Headlong flight—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Id.* Considered individually, none of these factors are alone sufficient, and must be considered within the context of all the facts presented. *Cortez*, 449 U.S. at 417, 66 L. Ed. 2d at 629; *Wardlow*, 528 U.S. at 124, 145 L. Ed. 2d at 576.

The majority states that they are constrained, at least in part, to affirm the trial court's decision in this case based on our Supreme Court's holding in *State v. Butler*, 331 N.C. 227, 415 S.E.2d 719 (1992). In *Butler*, defendant was with a group of people congregated on a corner known for its high drug activity. *Butler*, 331 N.C. at 231-32, 415 S.E.2d at 721. The officer had conducted daily surveillance of the corner for several months, and during that time had made four to six drug-related arrests. *Id.* When the police officers approached the defendant, "upon making eye contact with the uniformed officers, [the] defendant immediately moved away," which the Court concluded to be "behavior that is evidence of flight[.]" *Id.* at 233, 415 S.E.2d at 722. In summarizing the facts observed by the officer prior to stopping the defendant, the Court listed:

1) [D]efendant was seen in the midst of a group of people congregated on a corner known as a "drug hole"; 2) Hedges had had the corner under daily surveillance for several months; 3) Hedges knew this corner to be a center of drug activity because he had made four to six drug-related arrests there in the past six months; 4) Hedges was aware of other arrests there as well; 5) defendant was a stranger to the officers; 6) upon making eye contact with the uniformed officers, defendant immediately moved away, behavior that is evidence of flight; and 7) it was Hedges' experience that people involved in drug traffic are often armed.

Id. at 233, 415 S.E.2d at 722. In concluding reasonable suspicion existed for the police officer to conduct an investigatory stop of defendant, the *Butler* Court explained that:

The United States Supreme Court has held that mere presence in a neighborhood frequented by drug users is not, standing alone, a basis for concluding that the defendant was himself engaged in criminal activity. *Brown v. Texas*, 443 U.S. 47, 52, 61 L. Ed. 2d 357,

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362-63 (1979). Here, however, there was an additional circumstance—defendant’s immediately leaving the corner and walking away from the officers after making eye contact with them.

Id. at 234, 415 S.E.2d at 722-23.

In addition to *Butler*, the majority cites a plethora of case law in which “reasonable suspicion” was found based on some or all of the specific behaviors or circumstances listed above which can support an officer’s determination to conduct an investigatory stop under *Terry*. However, the fact remains that “reasonable suspicion” must be based on *objective* facts. *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70; *Sokolow*, 490 U.S. at 7, 104 L. Ed. 2d at 10; *Cortez*, 449 U.S. at 417, 66 L. Ed. 2d at 628. In order for something to be “objective,” it must have “actual existence or reality” and be “[u]ninfluenced by emotion, surmise, or personal prejudice.” *The American Heritage Dictionary* 857 (2d ed. 1985). While an officer may interpret objective facts through his experience and training, it remains paramount nevertheless that he have a “minimal level of objective justification” in deciding to initiate a *Terry* stop. *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70.

In the transcript, the sum total of objective facts presented to the trial court to support this particular *Terry* stop were: (1) “the area of Chandler and Amanda Place” was considered by Officer Pritchard to be “a well-known drug location with high drug activity that takes place there on a regular basis”; (2) Officer Pritchard watched two familiar but unknown individuals walk to defendant’s vehicle, and put “their hands into the vehicle”; and (3) the unknown individuals ran away when Officer Pritchard turned his cruiser around toward them, and one of the individuals “ducked” into a nearby house. Defendant committed no traffic offense.

With respect to the contention that “the area of Chandler and Amanda Place” was “a well-known drug location,” the record shows that Officer Pritchard based this opinion on the fact that he had made and assisted in other drug arrests in the same area during his two and half years with the Winston-Salem Police Department.⁴ According to the transcript, he had made “numerous” arrests in the Chandler and Amanda Place area, though he did not know the specific number of arrests made. When asked if he regularly patrolled the area in which defendant was arrested, he stated that he was assigned to an adjoin-

4. The trial court’s order shows that Officer Pritchard had three and a half years of experience, but a reading of the transcript shows that the arrest of defendant happened about a year prior to the hearing.

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ing beat at the time. The State offered no other evidence showing that this area was “a well-known drug location.” Moreover, as to the alleged transaction, Officer Pritchard did not see any exchange. In fact, the trial court found that “Officer Pritchard did not see *any* object or money in their hands, nor did he observe any direct exchange between the individuals and the Defendant or any other persons in the car.” (Emphasis added.)

These observations of the record render *Butler* inapplicable to this appeal. Officer Pritchard did not have the area in question under daily surveillance, he was not patrolling the exact location of Chandler and Amanda Place on a regular basis at the time of defendant’s arrest, defendant was not congregated with a group of suspected drug offenders under daily police scrutiny, and defendant made no suspicious movements upon the police cruiser turning toward him. Unlike *Butler*, which contained a laundry list of suspect activity, if we look only at defendant’s actions leading up to Officer Pritchard’s intervention, we are left only with defendant being approached by two individuals who put their hands into his car in a “well-known drug location.”

In *Butler*, our Supreme Court cites *United States v. Magda*, 547 F.2d 756 (2d Cir. 1976), *cert. denied*, 434 U.S. 878, 54 L. Ed. 2d 157 (1977). *Butler*, 331 N.C. at 234, 415 S.E.2d at 723. In *Magda*, a police officer observed two men “exchange something” on a street known for narcotics sales; the area in question was “particularly notorious as a center for drug traffic” and “under 24-hour surveillance” by police. *Magda*, 547 F.2d at 757-58. The officer actually saw “that each man gave and received something simultaneously.” *Id.* at 757. After witnessing this exchange, the defendant, Magda, walked across the street, while Magda’s “companion looked in [the officer’s] direction, turned in a rapid motion and immediately walked away.” *Id.* at 757-58.

Magda’s holding that someone’s actions other than the defendant’s could be a factor within the context of a *Terry* analysis was not applicable to the actual holding of *Butler*. As the *Butler* Court explained, the defendant was the person who “[left] the corner and walk[ed] away from the officers after making eye contact with them.” *Butler*, 331 N.C. at 234, 415 S.E.2d at 722-23. However, even assuming that this part of *Magda* applies to the current appeal through *Butler*, *Magda* hardly stands for the proposition that the flight of third persons other than the defendant is singularly sufficient for “reasonable

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suspicion.” Like *Butler*, the area of the arrest in *Magda* was subject to constant police scrutiny, and the officer in *Magda* actually observed an exchange between the individuals suspected of criminal activity. *Magda*, 547 F.2d at 757-58.

With respect to Officer Pritchard’s testimony that he observed unknown individuals inserting their hands into defendant’s vehicle, the majority cites *State v. Summey*, 150 N.C. App. 662, 564 S.E.2d 624 (2002) and *State v. Clyburn*, 120 N.C. App. 377, 462 S.E.2d 538 (1995), and argues that Officer Pritchard had reasonable suspicion based merely on “the appearance of a hand-to-hand drug transaction.” However, in *Summey*, the arresting officer was conducting a “drug surveillance operation” on the area in question, and the officer “positioned himself in view of a residence which had been the subject of a nuisance abatement proceeding for drug-related activities.” *Summey*, 150 N.C. App. at 663-64, 564 S.E.2d at 626. “A group of men were standing in the front yard of the residence” at the time the officer was conducting surveillance. *Id.* Within these facts not present in the current appeal, the *Summey* Court found “reasonable suspicion” for a *Terry* stop of the defendant’s vehicle where the officer merely observed

a white Nissan pickup truck with the rear window missing drive toward[] the residence and stop alongside the road. One of the men standing in the yard approached the truck and appeared to engage in a brief conversation with the driver. A few moments later, the man returned to the yard and the truck drove away.

Id.

Clyburn is even more distinguishable from the case *sub judice*. In that case, the record showed:

On the evening of 9 November 1993, Officers R.A. McManus and C.R. Selvey of the Charlotte-Mecklenburg Police Department conducted surveillance in the 1600 block of Remount Road. Both officers were aware of the area’s reputation for drug activity and had previously made drug arrests in the vicinity. While positioned in an unmarked car, the officers observed three black males standing in front of a vacant duplex across the street. Officer McManus testified that he observed several “meetings” whereby the three men were approached by individuals on foot who would speak briefly to one of the black males. During each “meeting,” the indi-

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vidual would disappear behind the duplex with the same black male, later identified as the defendant. The other two males remained in front of the duplex as if acting as lookouts. Each time the defendant reappeared, the other two men conferred with him. Officers McManus and Selvey had observed similar “meetings” during their years on the police force. Based on their training and experience, both officers testified that in their opinions the “meetings” were drug transactions.

Clyburn, 120 N.C. App. at 378, 462 S.E.2d at 539. After the surveilling officers witnessed this activity, they conducted a *Terry* stop of the defendant’s car after witnessing a passenger in the car engage in similar activity. *Id.*

Absent Officer Pritchard’s observing an actual exchange inside defendant’s car in this case, I believe the above case law amply demonstrates that the circumstantial evidence necessary for “reasonable suspicion” is substantially higher than (1) presence in a “drug location” and (2) the flight of third persons from an approaching police cruiser. Were the fleeing individuals the defendants in this appeal, their actions would certainly bear the indicia of guilt prescribed by our United States Supreme Court. *Wardlow*, 528 U.S. at 124, 145 L. Ed. 2d at 576. However, because they are not, my contention is that their actions gave Officer Pritchard “a strong intuitive feeling or a premonition” in light of his *prior*, and not then existing, experience at Chandler and Amanda Place with respect to defendant. While I recognize that such strong intuitions are a valuable tool in an officer’s execution of his duties, they nonetheless amount to a mere “hunch,” and are insufficient under the guarantees of the Fourth Amendment. *Sokolow*, 490 U.S. at 7, 104 L. Ed. 2d at 10. More importantly, however, they are insufficient to support the trial court’s conclusion of law that Officer Pritchard had reasonable suspicion to believe that defendant was involved in a drug transaction.

As such, because the trial court’s conclusion of law as to reasonable suspicion is based on insufficient objective facts, and given that no case law otherwise binds this Court to a contrary result, I would reverse defendant’s conviction.

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STEVE R. JONES, EMPLOYEE, PLAINTIFF V. STEVE JONES AUTO GROUP, EMPLOYER,
AND UNIVERSAL UNDERWRITERS GROUP, CARRIER, DEFENDANTS

No. COA08-1593

(Filed 3 November 2009)

1. Workers' Compensation— workplace mold—requirement to work in contaminated location

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff contracted an occupational disease from mold in his office. Although the nature of plaintiff's work as an auto dealership manager did not increase his risk for contracting pulmonary airway disease, the fact that his employment required him to work in a building contaminated with mold did place him at an increased risk.

2. Workers' Compensation— workplace mold—causal connection to illness

There was competent evidence in a workers' compensation case to support the Industrial Commission's findings that plaintiff's workplace exposure to mold caused his illness. There was no support for defendant's statement that the air sampling relied on by plaintiff's treating physicians did not reflect the air plaintiff breathed.

3. Workers' Compensation— workplace mold—no evidence of peculiar sensitivity

Although defendants argued in a mold-related workers' compensation case that plaintiff's illness was the result of a preexisting personal sensitivity and was not compensable, there was no evidence that plaintiff had a heightened peculiar sensitivity to mold before his exposure in the workplace.

4. Workers' Compensation— workplace mold—findings—ubiquitous mold

Testimony in a workers' compensation proceeding was competent to support challenged findings regarding plaintiff's occupational mold exposure despite defendant's contention that there was no competent evidence to distinguish plaintiff's occupational exposure from ubiquitous mold.

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5. Workers' Compensation— third-party settlement—lien not waived—remand

Defendants in a workers' compensation case did not waive their right to pursue a lien against third-party settlement proceeds where such a lien was the subject of a stipulation and a settlement agreement. The Industrial Commission failed to determine whether third-party settlement proceeds had been distributed, or to whom, and whether defendants were entitled to a lien. The matter was remanded.

Appeal by Defendants from Opinion and Award entered 12 September 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 May 2009.

Van Camp, Meacham & Newman, PLLC, by Thomas M. Van Camp, for Plaintiff.

Brooks, Stephens & Pope, P.A., by Matthew P. Blake and James A. Barnes IV, for Defendants.

STEPHENS, Judge.

I. Procedural History

On 3 January 2005, Plaintiff Steve R. Jones completed an Industrial Commission Form 18 seeking benefits for disability allegedly due to mold exposure in his place of employment. On 9 September 2005, Defendant Steve Jones Auto Group and Defendant Universal Underwriters Group (collectively, "Defendants") completed a Form 61 denying Plaintiff's claim. On 22 May 2006, Plaintiff filed a Form 33 request for hearing. The claim was heard by Deputy Commissioner Wanda Blanche Taylor on 21 June 2007. Deputy Commissioner Taylor entered an Opinion and Award on 1 February 2008 awarding Plaintiff benefits. From this Opinion and Award, Defendants appealed to the Full Commission. The matter was heard by the Full Commission on 5 August 2008, and by Opinion and Award entered 12 September 2008, the Full Commission affirmed with modifications Deputy Commissioner Taylor's Opinion and Award. Defendants appeal.

II. Factual Background

Plaintiff, 51 years old at the time the matter was heard by the Full Commission, is part-owner of Steve Jones Auto Group. In 1998, in his capacity as minority owner and employee, Plaintiff opened two new

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dealerships, Steve Jones Honda and Steve Jones Chevrolet. Plaintiff served as general manager of both dealerships. Plaintiff was responsible for making all management decisions, and oversaw sales, finance, and insurance. Plaintiff often worked 10-hour days and was described as very professional, sharp, and good with both customers and finances. At no time prior to mid-2000 did Plaintiff experience any medical ailments that prevented him from performing his duties and responsibilities on a full-time basis.

Between late 1999 and mid-2000, the building which housed Steve Jones Honda, and Plaintiff's office, was remodeled. After the remodeling was completed, Plaintiff moved back into his office in the building. However, Myrick Construction's failure to properly caulk and seal along the base of the exterior wall of Plaintiff's office caused water intrusion into the wallboard, wall cavity, sheetrock, and carpeting of Plaintiff's office.

In late 2000, Plaintiff began to experience medical problems, including excessive and uncontrolled coughing, wheezing, a burning sensation in his nose and mouth, headaches, dizziness, and a lack of energy. Plaintiff's work performance began to deteriorate as Plaintiff lost his ability to calculate numbers in his head, and Plaintiff had severe memory problems. Plaintiff's medical and performance issues continued to worsen until September 2003. Plaintiff continued to receive a wage of \$10,000 per month during this time, even though he was not performing his duties as general manager.

In April 2003, Steve Jones Auto Group's majority owner, Tom Davis, removed Plaintiff as general manager of the dealerships. Davis continued to pay Plaintiff his monthly salary until 28 December 2005. Plaintiff has not received a salary since that date.

In August 2003, Plaintiff's wife was undergoing a medical procedure performed by Dr. Jonathan Hasson, a vascular surgeon. During the procedure, Plaintiff began to cough uncontrollably and had to leave the room. After the procedure, Dr. Hasson spoke with Plaintiff about his symptoms and work conditions. Dr. Hasson opined that Plaintiff's symptoms may be the result of mold exposure. Following Plaintiff's discussion with Dr. Hasson, Plaintiff contacted Myrick Construction and had a representative from Myrick cut several holes in the wall of his office. The holes revealed that the wall cavity was "heavily laden" with black mold, with mold growing inside the sheetrock, insulation, and electrical receptacles.

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Plaintiff then contacted Mike Shrimanker of EEC, Inc., a certified industrial hygienist, registered professional engineer, certified safety professional, certified audio-metric technician, and certified Asbestos Hazard Emergency Response Act inspector. Mr. Shrimanker advised Plaintiff to leave the office and lock the door until Mr. Shrimanker arrived. When Mr. Shrimanker arrived, he observed black mold on the back of the sheetrock that had been cut out of the wall and on the backs of Plaintiff's chairs. Mr. Shrimanker took air and tape samples from inside Plaintiff's office to identify what kinds of mold were present. He also took air and tape samples from outside the building.

The mold testing established that there was no *stachybotrys*, commonly known as black mold, in the outdoor samples, but high levels of *stachybotrys* in the samples taken from inside Plaintiff's office. Mr. Shrimanker testified that *stachybotrys* should not have been present inside or outside of Plaintiff's office in any amount and that the average member of the general public is not exposed to *stachybotrys* on a regular basis. The testing further revealed that there was no *aspergillus*, another type of mold, in the outdoor samples, but elevated levels of *aspergillus* in the samples taken from inside Plaintiff's office. In addition, the testing revealed small levels of *penicillium*, a type of mold, in the outdoor samples, and significantly higher levels of *penicillium* in the samples taken from inside Plaintiff's office. Mr. Shrimanker testified that although *aspergillus* and *penicillium* are commonly found in the outside air, their levels should be greater outdoors than indoors. Testing of Plaintiff's home revealed no elevated levels of mold.

Dr. Donald E. Schmechel, a clinical professor of medicine at Duke University and board certified in neurology and psychology, first saw Plaintiff on 13 October 2003. He performed a physical examination of Plaintiff and diagnosed him with "asthmatic reactive airway disease." Dr. Schmechel also performed a neurological exam, which included cognitive screening, and diagnosed Plaintiff with "mild cognitive impairment[.]" According to Dr. Schmechel, there is no indication that Plaintiff suffered from any cognitive defects prior to his exposure to mold. It was Dr. Schmechel's opinion that Plaintiff's pulmonary airway disease is most likely the cause of his cognitive dysfunction.

Dr. Peter Kussin, an associate clinical professor of medicine at Duke University in the Division of Pulmonary, Allergy, and Critical Care Medicine, first saw Plaintiff on 23 October 2003. According to

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Dr. Kussin, before Plaintiff's exposure to mold, Plaintiff's childhood asthma had resolved and was asymptomatic. In October of 2003, however, Dr. Kussin reported that Plaintiff had evidence of both upper and lower airway problems, including hyperinflation of the lungs, inflammation and narrowing of his airways, and abnormalities of his upper airway and vocal chords. Dr. Kussin opined that Plaintiff's persistent asthma and related symptoms were caused by his exposure to mold at work.

Plaintiff also saw Dr. David C. Thornton, a physician at the Pinehurst Medical Clinic and board certified in internal, pulmonary, critical care, and sleep medicine, in October 2003. At the time of Plaintiff's first visit, he complained of a marked aggravation in his respiratory symptoms, including sudden onsets of shortness of breath and a terrible cough. Plaintiff also reported having problems with memory and dizziness, and an inability to focus. Dr. Thornton testified that stachybotrys is at the top of the list of dangerous molds because it is capable of provoking an immune response and because it produces toxins that can affect the human body and human function. Dr. Thornton opined that Plaintiff's prolonged exposure to the combination of stachybotrys, aspergillus, and penicillium "perpetuated and established in [Plaintiff] an immunologic state that perpetuated a very serious illness." In Dr. Thornton's opinion, Plaintiff's exposure to the high levels of mold at work was "the factor" in the onset of Plaintiff's lung inflammation.

III. Discussion

Appellate review of an opinion and award of the Full Commission is generally limited to (i) whether the Commission's findings of fact are supported by competent evidence, and (ii) whether the Commission's conclusions of law are justified by the findings of fact. *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). The Full Commission's conclusions of law are reviewed *de novo*. *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 127, 532 S.E.2d 583, 585 (2000).

A. Occupational Disease

[1] By Defendants' first argument, Defendants contend that the Commission erred in concluding that Plaintiff contracted an occupational disease as defined by N.C. Gen. Stat. § 97-53(13). We disagree.

N.C. Gen. Stat. § 97-53, which lists various compensable occupational diseases, does not include pulmonary airway disease among

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these. However, a disease not specifically listed in the statute may nonetheless be compensable pursuant to N.C. Gen. Stat. § 97-53(13), which defines an occupational disease as

[a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

N.C. Gen. Stat. § 97-53(13) (2007). Our Supreme Court has interpreted this language as requiring three elements in order to prove that a disease is an occupational disease: (1) the disease must be characteristic of and peculiar to the claimant's particular trade, occupation, or employment; (2) the disease must not be an ordinary disease of life to which the public is equally exposed outside of the employment; and (3) there must be proof of a causal connection between the disease and the employment. *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983); *accord Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 354, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). The first two elements of the *Rutledge* test are satisfied where the employee can show that "the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Rutledge*, 308 N.C. at 94, 301 S.E.2d at 365. The third element is satisfied if the employment " 'significantly contributed to, or was a significant causal factor in, the disease's development.' " *Hardin*, 136 N.C. App. at 354, 524 S.E.2d at 371 (citation omitted). Since *Rutledge*, this two-pronged requirement for proving an occupational disease, increased risk and causation, has been approved and applied repeatedly by this Court and the North Carolina Supreme Court. *Hassell v. Onslow County Bd. of Educ.*, 362 N.C. 299, 306, 661 S.E.2d 709, 714 (2008).

1. Increased Risk

Defendants first challenge the sufficiency of the evidence to support the Commission's determination that Plaintiff's employment exposed him to an increased risk of contracting his illness as compared to the public generally. Specifically, Defendants argue that "[t]he Commission disregarded our Supreme Court precedent which requires a link between the nature of an employment and the alleged occupational disease." We are unpersuaded by Defendants' argument and conclude that, on the record before us, we are bound by the prior

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decision of this Court in *Robbins v. Wake Cty. Bd. of Educ.*, 151 N.C. App. 518, 566 S.E.2d 139 (2002).

In *Robbins*, plaintiff filed a claim with the Commission seeking compensation for his wife's contraction of and death from mesothelioma. Plaintiff's wife ("Ms. Robbins") had worked for defendant as a secretary and graphic artist from 1978 to 1981. During her employment, Ms. Robbins worked at defendant's central administrative office building in a large room on the second floor that was divided by partitions. She also spent about two hours per day in the office's print shop and made daily trips to the basement of the building to place materials in courier boxes, which were located next to the boiler room. In 1988, a survey performed on the building revealed that the building contained substantial amounts of asbestos in the ceiling plaster, wall plaster, floor tile, pipe insulation in the boiler room and print shop, vibration dampers of the heating system, and numerous other areas.

In late 1992, Ms. Robbins developed a persistent cough. In January of 1993, a chest x-ray revealed a suspicious shadow in her lung, and a CT scan confirmed the presence of an egg-sized tumor in her right lung. Ms. Robbins was diagnosed with mesothelioma, a cancer most often associated with asbestos exposure. She died of the disease in June 1995 at the age of 41.

The Full Commission found and concluded that Ms. Robbins had contracted a compensable occupational disease as a result of her employment with defendant. In so concluding,

[t]he Commission found as fact that [Ms. Robbins'] employment at defendant's . . . facility exposed her to a greater risk of contracting mesothelioma than the public generally. The Commission found that *while the nature of [Ms. Robbins'] employment as a secretary and graphic artist did not place her at risk for contracting the disease, the fact that her employment required her to work in a building with higher-than-normal levels of asbestos did place her at such a risk*, and that the risk was higher than that to which the general public was exposed, as not all buildings contain significant amounts of friable asbestos.

Id. at 521, 566 S.E.2d at 142 (emphasis added). In upholding the opinion and award of the Full Commission, this Court concluded that the Commission's findings were supported by the testimony of Dr. Victor

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Roggli, an expert in the pathology of asbestos-related diseases of the lung, including mesothelioma. Dr. Roggli testified that it was his opinion that Ms. Robbins' exposure to asbestos at the building placed her at an increased risk for developing mesothelioma. He opined that mesothelioma is a disease which is characteristic of particular trades or occupations, such as Robbins' employment, where the employee is exposed to asbestos.

Dr. Roggli also testified that mesothelioma is not an ordinary disease of life that is typically seen in the general population. Dr. Roggli stated that mesothelioma is very rare among the general population, and that it is estimated that there exist only one or two cases per million people per year where mesothelioma develops without asbestos exposure. Thus, this Court concluded that "the Commission's findings with respect to the first two elements of the *Rutledge* test were sufficiently supported by competent evidence." *Id.* at 522, 566 S.E.2d at 142-43. This Court further concluded that the Commission's findings supported the Commission's conclusion of law that, as a result of her employment with defendant, Ms. Robbins sustained a compensable occupational disease within the meaning of N.C. Gen. Stat. § 97-53(13).

In the present case, the Full Commission found as fact that "Plaintiff's employment, and specifically, his exposure to mold for approximately three years, exposed [P]laintiff to a greater risk of developing his pulmonary airway disease than members of the general public not so employed."

This finding is supported by competent evidence in the record. Mr. Shrimanker testified that under normal conditions, "[t]he general public doesn't get exposed to stachybotrys" at any level. The results of the mold testing performed by Mr. Shrimanker on 27 August 2003 revealed a "large quantity" of stachybotrys in the tape and air samples taken from plaintiff's office, with no stachybotrys outside. Additionally, the test results revealed no aspergillus in the outdoor sample, but elevated levels of aspergillus in the samples from Plaintiff's office, and small levels of penicillium in the outdoor sample, with significantly higher levels of penicillium in samples taken from Plaintiff's office.

Dr. Thornton testified that stachybotrys is "perhaps the most noxious [mold] and most likely to affect human health in an adverse way." He further testified that Plaintiff's exposure to stachybotrys, aspergillus, and other molds present in his office placed him at an

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increased risk, greater than that of members of the general public, of developing the inflammation in his lungs.

Dr. Kussin also testified that while there may be as many as five million adults in this country with asthma, no more than “[one] percent have asthma as a result of occupational exposures or environmental exposures that are not allergic” He further testified that “even a smaller subset of that [one] percent” sustain the type of problems that Plaintiff experienced.

We conclude that this testimony is competent to support the Commission’s finding that Plaintiff’s work placed him at an increased risk for contracting pulmonary airway disease.

Defendants argue that Plaintiff’s testimony that he had visited hundreds of automobile dealerships in his 20-year career but only two had contained mold, as well as Dr. Thornton’s testimony that he knows of no correlation between the auto dealership industry and mold-related disease, shows that there is no link between mold-related disease and auto dealerships. However, as in *Robbins*, although the nature of Plaintiff’s employment as an automobile dealership manager did not increase his risk for contracting pulmonary airway disease, the fact that his employment required him to work in a building contaminated with mold did place him at an increased risk. Competent evidence in the record supports the Commission’s determination that the risk to which Plaintiff was exposed was greater than the risk to which the general public is exposed as stachybotrys should not have been present in Plaintiff’s office in any amount. Because the Commission’s findings are supported by competent evidence, this Court is bound by them, even though the record also contains contrary evidence. *Gilberto v. Wake Forest Univ.*, 152 N.C. App. 112, 118, 566 S.E.2d 788, 792 (2002).

2. Causation

[2] Defendants next argue that the expert medical testimony relied upon by the Commission was not sufficient to prove a causal connection between Plaintiff’s illness and his employment. Specifically, Defendants argue that medical experts erroneously premised their opinions “on the temporal relationship between discovery of mold [in] [P]laintiff’s office and the onset of [P]laintiff’s symptoms.” Defendants’ argument is meritless.

“[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed

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from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.” *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). However, “ ‘expert opinion testimony [that] is based merely upon speculation and conjecture . . . is not sufficiently reliable to qualify as competent evidence on issues of medical causation.’ ” *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 262, 614 S.E.2d 440, 445 (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)), *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177 (2005); *see also Dean v. Carolina Coach Co.*, 287 N.C. 515, 522, 215 S.E.2d 89, 94 (1975) (“[A]n expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.”).

The Commission made the following findings of fact regarding causation:

25. Dr. Thornton was of the opinion that [P]laintiff’s exposure to mold in the [workplace] was the cause of the inflammation in his lungs.

. . . .

29. In Dr. Thornton’s opinion, the debilitating symptoms that [P]laintiff exhibits, including problems with breathing, coughing, inflamed airways, and the acceleration or exacerbation of those symptoms, as well as his cognitive defects are all caused by long term exposure to stachybotrys and other molds and their toxins.

. . . .

33. The basis for Dr. Thornton’s causation opinion *is not just the temporal relationship*, which he described a[s] “quite compelling,” but the level of mold on the occupational health testing, the types of mold present, the intensity of the exposure, the duration of the exposure, and the fact that anti-bodies were identified in [P]laintiff’s blood stream.

. . . .

37. Dr. Kussin was of the opinion that [P]laintiff’s persistent asthma was causally related to his exposure to mold at the [workplace]. . . .

. . . .

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56. Plaintiff's [workplace] exposure to mold caused [P]laintiff's pulmonary condition and was a substantial contributing factor in the development of [P]laintiff's pulmonary airway disease and resulting conditions.

(Emphasis added.)

Dr. Thornton opined that Plaintiff's prolonged exposure to the combination of stachybotrys, aspergillus, and penicillium "perpetuated and established in [Plaintiff] an immunologic state that perpetuated a very serious illness" and that Plaintiff's symptoms and problems "were significantly aggravated if not caused completely" by his exposure to mold in the workplace. Dr. Thornton explained that while "there is not a specific medical test that would clearly demonstrate definitively" that Plaintiff's exposure to mold caused his illness, based on "the constellation of . . . [Plaintiff's] symptoms, the time course of their onset, [and Plaintiff's] response to therapy[.]" he felt strongly that Plaintiff's illness was caused by his exposure to mold in his workplace. Thus, contrary to Defendants' contention, Dr. Thornton's opinion is not based solely "on the temporal relationship between discovery of mold [in] [P]laintiff's office and the onset of [P]laintiff's symptoms."

Dr. Kussin testified that he did not know of another irritant or exposure, other than the mold, that would have been the primary cause of Plaintiff's symptoms and opined that Plaintiff's persistent asthma and related symptoms were caused by his exposure to mold at work.

Although Defendants argue that "[P]laintiff's treating physicians assumed drastic mold exposure based on air sampling data that did not reflect the air [P]laintiff breathed daily," Defendants cite no evidence from the record and make no argument in support of this assertion. Moreover, our review of the evidence reveals no support for this statement.

We conclude that the testimony of Dr. Thornton and Dr. Kussin is competent evidence to support the Commission's findings of fact that Plaintiff's exposure to mold at his place of work caused his illness. This Court is thus bound by these findings. *Gilberto*, 152 N.C. App. at 118, 566 S.E.2d at 792.

3. Personal Sensitivity

[3] Defendants further argue that Plaintiff's illness is not compensable as it is the result of a preexisting personal sensitivity. We disagree.

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This Court has held that an individual's personal sensitivity to chemicals does not result in an occupational disease compensable under our workers' compensation scheme. *See, e.g., Hayes v. Tractor Supply Co.*, 170 N.C. App. 405, 612 S.E.2d 399 (2005), *disc. review denied*, 359 N.C. 851, 619 S.E.2d 505 (2005); *Nix v. Collins & Aikman, Co.*, 151 N.C. App. 438, 566 S.E.2d 176 (2002). In *Hayes*, plaintiff had an allergic reaction to the chemical naphthalene, which was stocked in plaintiff's employer's store. Plaintiff had a long history of allergies and reactions to substances, including a diagnosis of "chemical sensitivity," prior to her exposure to naphthalene at work. *Hayes*, 170 N.C. App. at 406, 612 S.E.2d at 401. Because plaintiff had a "heightened peculiar susceptibility to chemicals . . . [which] predated the exposure to naphthalene[.]" *id.* at 409, 612 S.E.2d at 402, this Court affirmed the Commission's conclusion that plaintiff had failed to prove "that her employment with defendant-employer placed her at an increased risk of contracting the present condition[.]" *Id.* at 408, 612 S.E.2d at 402 (quotation marks omitted).

Similarly, in *Nix*, plaintiff developed hyperactive airway disease. Although plaintiff contended that his condition was caused by his exposure to chemicals in the workplace, a testifying physician opined that "plaintiff was only at an increased risk due to his 'idiopathic' sensitivity to chemicals at the workplace[.]" *Nix*, 151 N.C. App. at 444, 566 S.E.2d at 179, and that "only plaintiff's sensitivities to the chemicals made him more susceptible to the disease." *Id.* at 444, 566 S.E.2d at 180. Thus, this Court affirmed the Commission's conclusion that "[p]laintiff's condition was caused by his personal, unusual sensitivity to small amounts of certain chemicals." *Id.* at 441, 566 S.E.2d at 178 (quotation marks omitted).

In this case, the Commission made the following findings of fact relevant to whether Plaintiff's illness was a result of a preexisting personal sensitivity:

30. Dr. Thornton was of the opinion that [P]laintiff's exposure to mold was occupational in nature and not a personal sensitivity that produces "a noxious reaction." . . .

. . . .

63. Plaintiff's disability was not caused by a "personal sensitivity" to mold.

Dr. Thornton testified that "[i]n situations of allergic mediated asthma, or occupational asthma mediated by a toxin, we often see a

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worsening of asthma due to the inflammatory response from an intense exposure.” Dr. Thornton explained that the reaction can last for weeks, months, or longer, and symptoms can linger for years after the exposure to the toxin has terminated. He further explained that “[t]his is a common scenario in a number of different asthmatic exposures in the workplace, and could certainly be seen with any intense exposure to a mold. . . . And so, this is different than a sensitivity, for example, to something that produces a noxious reaction.” Dr. Thornton further testified that “after an intense exposure, an allergic response is established. After the establishment of the allergic response, then that allergic response can continue and be perpetuated for years.” Dr. Thornton stated that he had no way to know if Plaintiff was sensitive to the molds that were present in his office before he was exposed to them there. When asked if the exposure that Plaintiff experienced at his place of employment could have created an allergic response to the molds, Dr. Thornton replied, “Yes.”

Dr. Kussin testified that Plaintiff’s reaction to the mold was “not an allergy in the way you’re allergic to dust or cats or . . . ragweed. The changes that occur in the type of asthma that [Plaintiff] has can only be described generically as inflammatory, and the word ‘allergic’ doesn’t necessarily need to be invoked.”

Thus, unlike in *Hayes* and *Nix*, and contrary to Defendants’ contention, there is no evidence in this case that Plaintiff had a heightened peculiar susceptibility to mold which predated his exposure to the mold at his workplace. To the contrary, the evidence establishes that Plaintiff’s sensitivity to mold was *caused* by his exposure to mold in the workplace. Accordingly, there is competent evidence to support the Commission’s findings of fact on this issue. Defendants’ argument is overruled.

We reiterate that, although the record contains evidence which would support contrary findings, the Commission’s findings regarding the genesis and nature of Plaintiff’s occupational disease are sufficiently supported by competent evidence in the record and are thus conclusive on appeal. *Robbins*, 151 N.C. App. at 523, 566 S.E.2d at 143. We hold that these findings support the Commission’s conclusion of law that, as a result of Plaintiff’s employment with Defendant Steve Jones Auto Group, Plaintiff developed a compensable occupational disease within the meaning of N.C. Gen. Stat. § 97-53(13).

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B. Occupational Mold Exposure

[4] Defendants next assert that “[t]here is no competent evidence that distinguishes Plaintiff’s occupational mold exposure from mold that is ubiquitous in the environment.” Specifically, Defendants argue that the Commission’s findings of fact 10 through 17 are not supported by competent evidence.

The challenged findings of fact are as follows:

10. Mr. Shrimanker observed black mold in [P]laintiff’s office prior to the tests. This mold was located on the inside of the sheetrock, insulation, and electrical receptacles as well as in the carpet in [P]laintiff’s office. According to Shrimanker, the sheetrock behind the wall had also been “covered with mold” due to defects in construction, and the saturation had been going for a “long time.”

11. Mr. Shrimanker was of the opinion that under normal conditions to which the general public is exposed, stachybotrys should not be present at any level. Although penicillium and aspergillus are commonly found in the outside air, the levels of aspergillus and penicillium should be greater outdoors than indoors. The mold testing performed on August 27, 2003 found no stachybotrys in the outdoor sample and high levels of stachybotrys in the tape and air samples in [P]laintiff’s office. According to Mr. Shrimanker, both the air and bulk samples “indicated that stachybotrys spores were present in high concentrations.” . . . There were small levels of penicillium in the outdoor sample, but the levels of penicillium in the air and tape samples in [Plaintiff’s] office were significantly greater than the outdoor sample.¹

12. Exposure to stachybotrys, which contains mycotoxins, can cause different symptoms in different individuals. Common symptoms include coughing, headache, dizziness, malaise, burning in the nose and mouth, and cold and flu-like symptoms. Plaintiff was experiencing most, if not all, of these symptoms between late 2000 and August 27, 2003 when the samples were originally tested.

1. The Commission errantly stated that “[t]he testing found no aspergillus in the tape and air samples in [Plaintiff’s] office.” However, the uncontradicted evidence established that the testing revealed no aspergillus in the outdoor samples, but elevated levels of aspergillus in the samples taken from inside Plaintiff’s office.

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13. *Stachybotrys* is known as “black mold,” and, according to Mr. Shrimanker, is the most dangerous of the molds because of its ability to produce mycotoxins. *Stachybotrys* may produce a trichothecene mycotoxin-sutratoxin H—“which is poisonous by inhalation.” *Penicillium* can cause extrinsic asthma and some species can also produce mycotoxins. *Aspergillus* can also produce mycotoxins.

14. As the mold dries out, it can be released by pressure, or walking on the carpet and by air movement through the use of air conditioning or heating unit. Defendants’ expert, Dr. Dalton, agreed with this assessment. According to Mr. Shrimanker, mold can also travel from wall cavities into air through openings in the wall, including electrical receptacles.

15. The *stachybotrys*, *penicillium*, and *aspergillus* species found in [P]laintiff’s office in the late 2000 through August 27, 2003 were released into the air in the office.

16. Between late 2000 and August 2003, as a result of [P]laintiff’s presence in his office, he was exposed to and inhaled mold spores, including *stachybotrys*, *penicillium* and *aspergillus*.

17. Plaintiff’s home was tested for mold and no unusual or elevated levels of mold were found.

Mr. Shrimanker testified that upon entering Plaintiff’s office, he observed black mold on the inside of the sheetrock and on the back sides of Plaintiff’s chairs. Mr. Shrimanker also took photographs which showed mold on the sheetrock, insulation, and electrical receptacles in Plaintiff’s office. Mr. Shrimanker’s report states that “no sealer or wall barrier(s) were installed at ground level near the wall(s) adjacent to the downspout” and, thus, “[i]t would be reasonable to assume that water enters the building and has kept the carpet and the interior space between the walls wet during heavy rain episodes.” Mr. Shrimanker testified that “when rain stops and over a period of time the carpet dries out, and people walk and so forth, it will kick the spores into the air.”

Mr. Shrimanker took tape samples of the mold from the back of the sheetrock, the back of the wallpaper, and the exterior sheetrock wall. Air samples were also taken from inside Plaintiff’s office and outside the building. The analysis of the samples indicates that *stachybotrys* spores “were present in high concentrations” inside Plaintiff’s office. *Penicillium* and *aspergillus* were present inside as

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well. A report from testing done on Plaintiff's home revealed the presence of some mold spores, but not at unusual or elevated levels.²

Defendants contend that there is no competent evidence that the mold escaped the wall cavity or that Plaintiff breathed the mold. However, Mr. Shrimanker testified that mold spores are blown through the air conditioning and heating vents and escape through the space surrounding electrical outlets, network cables, and drop ceilings. Photographs show mold on the electrical receptacles in Plaintiff's office. Furthermore Mr. Shrimanker testified that the carpet was contributing to the mold found in Plaintiff's office and recommended that the carpet be replaced during remediation. Although Mr. Shrimanker did not test the carpet to determine if mold was present under the carpet, he testified that, based on his observations and experience, there should have been. Mr. Shrimanker also testified that the day the carpet was pulled up to be replaced, he observed that the carpet was "full of mold." After the carpet had been removed, tape samples showed stachybotrys still on the floor. Furthermore, Mr. Shrimanker testified that when dry, moldy carpet is walked on or disturbed in some other manner, the mold spores can get released into the air.

Defendants argue that Mr. Shrimanker's testimony was "[in]competent evidence of an occupational exposure to mold" as he did not test the carpet to determine if it contained mold or what kinds of mold were present. However, Mr. Shrimanker testified that he observed mold on the carpet and acknowledged that identifying mold is "what [he] do[es] for a living[.]" Furthermore, the tape and air samples taken from Plaintiff's office identified that stachybotrys, penicillium, and aspergillus were present in Plaintiff's office.

Mr. Shrimanker testified that the general public is not exposed to stachybotrys under normal circumstances. He explained that stachybotrys is not found outdoors and is only found indoors when there has been water intrusion and there is an organic material such as paper or cellulose present upon which the mold can thrive. Mr. Shrimanker further testified that stachybotrys, or black mold, is the most dangerous kind of mold and that the presence of aspergillus and penicillium in addition to stachybotrys is like adding "insult to an injury" in that aspergillus and penicillium make the illness from

2. Although Defendants assert that the Commission's finding that "testing showed no mold in [P]laintiff's house" is not supported by competent evidence, the Commission did not make such a finding. The Commission found that "no *unusual or elevated levels* of mold" were present in Plaintiff's house. (Emphasis added.)

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stachybotrys exposure worse. Mr. Shrimanker's report indicates that stachybotrys may produce mycotoxins such as sutratoxin "which is poisonous by inhalation." Penicillium can cause extrinsic asthma and some species can produce mycotoxins. Aspergillus can also produce mycotoxins.

Based on his experience, it was Mr. Shrimanker's opinion that Plaintiff's symptoms, including the reaction in his lungs, cough, fever, and burning eyes, were consistent with long-term exposure to stachybotrys, aspergillus, and penicillium.

Notwithstanding this testimony, Defendants further argue that the air samples taken on 27 August 2003 did not reflect the air quality Plaintiff breathed. While Mr. Shrimanker testified that on any given day, depending on the conditions, an air sample can reveal differing levels of mold in the same room, he further explained that any level of stachybotrys, whether it be on a tape sample or in the air, in an indoor facility is cause for concern as an individual should not be exposed to stachybotrys to any degree. Furthermore, "[o]ur Supreme Court rejected the requirement that an employee quantify the degree of exposure to the harmful agent during his employment." *Matthews v. City of Raleigh*, 160 N.C. App. 597, 606, 586 S.E.2d 829, 837 (2003) (quotation marks and citations omitted).

We conclude that the foregoing testimony is competent to support the challenged findings of fact regarding Plaintiff's occupational mold exposure. Thus, the assignments of error upon which Defendants' argument is based are overruled.

C. Lien on Third-Party Settlement Proceeds

[5] Defendants finally argue that, pursuant to N.C. Gen. Stat. § 97-10.2, they are entitled to a lien against third-party settlement proceeds received by Plaintiff. Plaintiff responds that Defendants failed to offer evidence at the hearing on the issue of a lien, and, thus, have waived any right to pursue a lien. However, the parties stipulated to the following:

Defendants' issues to be addressed by the Commission are:

....

- e. If [P]laintiff's claim is compensable, have third-party settlement proceeds been distributed, to whom were they distributed, and, pursuant to N.C. Gen. Stat. § 97-10.2(h), may

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any resulting lien be enforced against persons receiving such funds[.]

Furthermore, the record contains a “Settlement Agreement and Release of Claims” wherein

Steve Jones Auto Group, Inc. d/b/a Steve Jones Honda, Steven R. Jones, and Sherrie L. Jones (collectively referred to as “Plaintiffs”), Myrick Construction, Inc. (“Myrick”), Commercial Acoustical and Drywall, Inc. (“CAD”), and Rockingham Paint and Glass Center, Inc. (“RPGC”)

entered into a settlement agreement for claims arising out of “defects in the construction and renovation of the Steve Jones Honda dealership” providing for the payment of \$1,000,000 to Plaintiffs. Pursuant to that agreement,

Steven R. Jones agrees that any government or private liens, claims or demands for workers’ compensation liens and/or medical expenses and services, and/or any unpaid bills owed for medical related services rendered to him prior to the date of this Agreement, will be paid from the sum he is to receive pursuant to this settlement agreement prior to distribution to him.

We conclude that Defendants have not waived their right to pursue a lien against such third-party settlement proceeds.

An injured employee has the exclusive right to enforce the liability of a third party within the first twelve months following an injury. N.C. Gen. Stat. § 97-10.2(b) (2007). Pursuant to subsection (h) of section 97-10.2, “[i]n any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest . . . upon any payment made by the third party by reason of such injury or death.” N.C. Gen. Stat. § 97-10.2(h) (2007). This lien “may be enforced against any person receiving such funds[,]” *id.*, is a lien against “all amounts paid or to be paid” to the employee, *Hieb v. Lowery*, 344 N.C. 403, 408, 474 S.E.2d 323, 326 (1996) (emphasis removed), and is mandatory in nature. *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 90, 484 S.E.2d 566, 569 (1997).

Here, the Commission failed to determine whether third-party settlement proceeds had been distributed; if so, to whom they were distributed; and whether Defendants were entitled to a lien on those funds under N.C. Gen. Stat. § 97-10.2. Accordingly, we remand this

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case to the Commission to address and resolve the lien issue raised by Defendants.

AFFIRMED in part and REMANDED in part with instructions.

Chief Judge MARTIN and Judge HUNTER, JR. concur.

IN THE MATTER OF: M.L.T.H.

No. COA08-1569

(Filed 3 November 2009)

1. Appeal and Error— timeliness—juvenile—motion to suppress denied

A juvenile's notice of appeal was not timely where it was filed 85 days after entry of an order denying a motion to suppress his statement to officers. N.C.G.S. § 7B-2602 refers to the order which is being appealed and would have allowed written notice of appeal within 70 days since no disposition was made within 60 days. However, the appeal was under a grant of *certiorari*.

2. Juveniles— delinquency—custodial interrogation—notice of rights—persons present

The *Miranda* rights form used by a sheriff's department in questioning a juvenile correctly stated his *Miranda* rights, but did not accurately state his juvenile rights as provided by N.C.G.S. § 7B-2101. The juvenile was advised incorrectly that he could have his brother (who was 21 years old and serving in the Marine Corps) present during his custodial interrogation while the statute provides only for a parent, guardian, or custodian to be present during questioning.

3. Juveniles— delinquency—custodial interrogation—notice of rights—persons present—prejudicial error

A violation of N.C.G.S. § 7B-2101 in a delinquency proceeding concerning the family member who was present during an interrogation was prejudicial where the juvenile made statements without which the State's case would have been much weaker.

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Appeal by juvenile from orders entered 3 April 2008 by Judge William G. Stewart and 5 May 2008 by Judge John Covolo in District Court, Nash County. Heard in the Court of Appeals 19 May 2009.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Gail E. Dawson, for the State.

Kimberly P. Hoppin, for juvenile-appellant.

STROUD, Judge.

The juvenile M.L.T.H. (“Micah”)¹ appeals from a 3 April 2008 order denying his motion to suppress and the order adjudicating him as delinquent, entered on 5 May 2008. For the reasons stated below, we reverse the order denying Micah’s motion to suppress, vacate the order adjudicating Micah as delinquent, and remand to the trial court for further proceedings.

I. Procedural background

Micah, age fifteen, lived at home with his mother, father, and four younger siblings. At the time of the events relevant to this appeal, Micah’s older brother (“Bill”)² did not live with Micah and the rest of the family. Bill was 21 years old and served in the United States Marine Corps. Micah and his brothers sometimes visited Bill on weekends.

On 25 February 2008 Investigator M. Strickland of the Nash County Sheriff’s Department received a referral from the Department of Social Services regarding an alleged incident involving sexual contact between Micah and his younger brother (“Jake”).³ On that same date, Investigator Strickland called Micah’s home, but his parents were not there. She talked to Bill instead. Investigator Strickland asked the entire family to come to the Sheriff’s office, and they did so when the parents returned home. Immediately upon their arrival at the Sheriff’s office, Investigator Strickland took all of the children upstairs to an interview room on the third floor and left the parents on the first floor of the Sheriff’s department. She then began interviewing the children, starting with Jake, the alleged victim, and then Micah.

1. We will refer to the minor child M.L.T.H. by the pseudonym Micah to protect the child’s identity and for ease of reading.

2. A pseudonym.

3. A pseudonym.

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When Investigator Strickland brought Micah to the interview room, she first asked him if he wanted to speak with her alone or “did he want his parents or did he want his brother or did he want anybody basically[.]” Micah replied that he wanted Bill, his older brother. Before questioning Micah, Investigator Strickland read him his juvenile Miranda rights from the Nash County Sheriff’s office Miranda Rights form. She wrote onto the form that Bill was present “per [Micah’s] request.”

Micah confessed to certain incidents involving Jake. As a result, Micah was charged in petitions filed on 27 February 2008 with three counts of felonious sex offense with a child, one count of attempted first degree sexual offense, and three counts of indecent liberties between children.

On 18 March 2008, Micah’s counsel filed a motion to suppress the incriminating statements which Micah made to Investigator Strickland. By order entered on 3 April 2008, the trial court denied defendant’s motion to suppress, without making any findings of fact or conclusions of law.

On 22 April 2008, Micah entered an admission to one count of felonious sex offense with a child, in violation of N.C. Gen. Stat. § 14-27.4(a)(1), preserving his right to appeal upon the order denying his motion to suppress. The other allegations were dismissed without prejudice. Based upon Micah’s admission, the trial court entered an order on 5 May 2008 adjudicating Micah as delinquent and continued the case for disposition on 8 July 2008. Pending disposition, Micah was held in secure custody and ordered to complete the sex offenders’ class. On 27 June 2008, Micah filed notice of appeal to the 3 April 2008 ruling upon his motion to suppress and the 5 May 2008 order which adjudicated Micah as a delinquent.

On 9 September 2008, the trial court entered a disposition order, ordering a level two disposition, wherein Micah was placed on 12 months of supervised probation, with various requirements, including electronic monitoring and intensive supervision. Micah has not appealed from the disposition order.

II. Jurisdiction

Micah states in his statement of grounds for appellate review that his appeal is pursuant to N.C. Gen. Stat. § 7B-2602 (2007) and N.C.R. App. P. Rule 3(b)(1), and the State does not question his right to appeal. However, it is the duty of this court to determine, as an initial

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matter, whether it has jurisdiction to consider an appeal. Unfortunately, this case presents several complex procedural issues which neither party addressed in the briefs.

The Juvenile Code provides that

review of any final order of the court in a juvenile matter under [Article 26] shall be before the Court of Appeals. Notice of appeal shall be given in open court at the time of the hearing or in writing within 10 days after entry of the order. However, if no disposition is made within 60 days after entry of the order, written notice of appeal may be given within 70 days after such entry. A final order shall include:

- (1) Any order finding absence of jurisdiction;
- (2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken;
- (3) Any order of disposition after an adjudication that a juvenile is delinquent or undisciplined; or
- (4) Any order modifying custodial rights.

N.C. Gen. Stat. § 7B-2602 (2007).

Micah has not appealed from the disposition order, the only “final order” in this matter. He has appealed from the order denying his motion to suppress and from the adjudication order. The disposition order was not entered until 127 days after the adjudication order and 159 days after Micah filed notice of appeal. We must therefore consider (1) whether Micah’s appeal was timely; (2) whether his appeal is interlocutory; and (3) if his appeal was not timely or was interlocutory, are there any grounds by which this Court may review his appeal.

A. Timeliness

[1] This Court has no jurisdiction to hear an appeal if it is not timely. *In re A.L.*, 166 N.C. App. 276, 277, 601 S.E.2d 538, 538 (2004) (“It is well established that failure to give timely notice of appeal . . . is jurisdictional, and an untimely attempt to appeal must be dismissed.” (citation, quotation marks and brackets omitted)). “The Court of Appeals has limited jurisdiction to review final orders of the trial court in juvenile matters. Notice of appeal must be made in open court at the time of the hearing or in writing within ten days after the entry of the order.” *Id.* at 277, 601 S.E.2d at 538 (citing N.C. Gen. Stat. § 7B-2602 (2003)).

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It is clear that notice of appeal was not given within 10 days after entry of either order from which Micah has appealed. However, the disposition order was not entered until 127 days after the adjudication order. Thus, this appeal falls within the provision of N.C. Gen. Stat. § 7B-2602 that “if no disposition is made within 60 days after entry of the order, written notice of appeal may be given within 70 days after such entry.” Although no case has addressed this portion of the statute since its revision in 1998,⁴ this court did address the exact same provision in the prior statute, stating that, “We believe that under this section of the statute an adjudication of delinquency is not a final order. No appeal may be taken from such order unless no disposition is made within 60 days of the adjudication of delinquency.” *In re Taylor*, 57 N.C. App. 213, 214, 290 S.E.2d 797, 797 (1982). In *Taylor*, the juvenile attempted to appeal the adjudication order eight days after its entry and no disposition had been made, so the appeal was dismissed. *Id.* at 213, 290 S.E.2d at 797. Therefore, the only reason that Micah might have a right to appeal his adjudication order, which is an interlocutory order, is that the disposition order was entered more than 60 days after the adjudication order.

As to the notice of appeal to the order denying suppression of Micah’s statement, no notice of appeal was “given in open court at the time of the hearing.” The hearing was held on 25 March 2008, and appeal was never mentioned in the transcript. Notice of appeal was not given “in writing within 10 days after entry of the order,” as the order was entered on 3 April 2008 and the written notice was filed 27 June 2008. However, a disposition order was not entered within 60 days after the adjudication of delinquency, thus possibly extending the time Micah had to file a notice of appeal of the order denying suppression. The question becomes one of interpretation of the statute. It provides that

review of any final order of the court in a juvenile matter under [Article 26] shall be before the Court of Appeals. Notice of appeal

4. *In re Laney*, 156 N.C. App. 639, 577 S.E.2d 377, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 762 (2003) addressed time for appeal in abuse, neglect, or dependency proceedings, under the version of N.C. Gen. Stat. § 7B-1001 which was in effect in 2003, which had the same relevant language as does the current version of N.C. Gen. Stat. § 7B-2603(a). The *Laney* court held that “we do not believe the General Assembly intended to permit appeals to be filed during the sixty-day period. The statute gives the trial court sixty days to enter a final disposition in a case. It follows that an appeal cannot be taken from the adjudication or temporary dispositional order until the sixty-day period has run. If a final order has not been entered at the conclusion of this sixty-day period, the statute provides a ten-day period to appeal the initial order.” *Id.* at 643, 577 S.E.2d at 379.

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shall be given in open court at the time of the hearing or in writing within 10 days after entry of the order. However, if no disposition is made within 60 days after entry of the order, written notice of appeal may be given within 70 days after such entry.

N.C. Gen. Stat. § 7B-2602. Setting aside, for now, the question of whether either the suppression order or the adjudication order can be a “final order,” it appears that when the statute refers to “entry of the order,” it is referring to the order which is being appealed. In *Taylor*, the subject of the appeal was the adjudication order only, and its date of entry was used as the relevant date from which to measure the appeal. *Taylor*, 57 N.C. App. at 213, 290 S.E.2d at 797. However, here we have two orders, so they must be considered separately. Reading the facts as to the suppression order into the statute, it reads “if no disposition is made within 60 days after entry of the [order denying the motion to suppress], written notice of appeal may be given within 70 days after [entry of the order denying the motion to suppress.]” See N.C. Gen. Stat. § 7B-2602. Therefore, the notice of appeal of the order denying the motion to suppress, which was filed 85 days after its entry, was not timely filed. This court therefore has no jurisdiction based upon the notice of appeal to consider Micah’s appeal as to the denial of the motion to suppress, and all of Micah’s arguments on appeal are directed to this order.

Appealable final orders include “[a]ny order of disposition after an adjudication that a juvenile is delinquent or undisciplined[.]” *Id.* “[A]n adjudication of delinquency is not a final order. No appeal may be taken from such order unless no disposition is made within 60 days of the adjudication of delinquency.” *Taylor*, 57 N.C. App. at 214, 290 S.E.2d at 797. However, pursuant to N.C.R. App. P. 21(a) (1), as Micah has lost his right to appeal by failure to file his appeal in a timely manner, and as the orders from which he has appealed are interlocutory, we may exercise our discretion to treat his appeal as a petition for certiorari.

The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists

N.C.R. App. P. 21(a) (1); See *In re K.C.*, — N.C. App. —, —, 681 S.E.2d 559, 561 (2009). We therefore treat Micah’s appeal as a petition for certiorari and grant certiorari to consider the arguments he has raised regarding denial of the motion to suppress his statement.

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III. Juvenile Miranda Rights

The Miranda Rights form used by Investigator Strickland included the Miranda rights applicable to all custodial interrogations, as well as the following provisions which are relevant to a custodial interrogation of a juvenile:

3. You have the right to have a parent, guardian, custodian or any other person present during questioning. [Initialed by Micah] (*A child 14 years of age or older may waive the right to have a parent, guardian or custodian present during questioning but must be advised of such rights. A child less than 14 years of age must be questioned in the presence of either a parent, guardian, custodian, or attorney. If an attorney is not present the parent, guardian, or custodian must be advised of the juvenile's rights. A parent, guardian, or custodian, however, cannot waive any right on behalf of the juvenile.*)

....

IF JUVENILE COMPLETE THE FOLLOWING

I, [Bill], being the (____ ~~parent~~ [brother]⁵ ____ guardian ____ custodian) of [Micah] have (. . . had read to me) this statement of my child's rights and I understand what his/her rights are. I am willing to have him/her make a statement and answer questions. I do not want an attorney for my child at this time. I understand and know what he/she is doing and voluntarily consent to have him/her answer your questions.

Signed [Signature of Bill]

Micah also signed the form, consenting to waiver of his Miranda rights, as well as his Juvenile Miranda rights, to have a parent, guardian, or custodian present during his questioning. Investigator Strickland then began questioning Micah, with Bill present. Micah made a verbal statement to Investigator Strickland, and then he prepared a written statement.

IV. Motion to Suppress

[2] N.C. Gen. Stat. § 7B-2101(d)(2007) requires that “[b]efore admitting into evidence any statement resulting from custodial interrogation, the court shall *find* that the juvenile knowingly, willingly, and

5. The Nash County Miranda Rights form did not have a blank for “brother” but “parent” was struck through and “brother” was inserted above this designation.

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understandingly waived the juvenile's rights." (emphasis added). Although not specifically designated as findings of fact, upon denying the motion to suppress, the trial court did state in open court that:

[I]t's my understanding that he had the opportunity to request his parents to be present. He testified that that was made known to him, that he had that option, that he did not request that option. He did not request any guardian or custodian or other person other than his older brother.

He certainly would have had the right to waive the—due to his age, to waive the presence of any persons. He requested that his brother be with him. That was allowed. I can't find, based on what I've heard, that his rights were violated with regard to this, Mr. Manning.

I'm going to deny the motion to suppress and find that his statement would be admissible.

These statements by the trial court are findings of fact, although the trial court did not specifically identify them as such. *See State v. Oglesby*, 361 N.C. 550, 552-53, 648 S.E.2d 819, 820 (2007) (the court affirmed the trial court's findings of fact made pursuant to N.C. Gen. Stat. § 7B-2101(d) in open court "[a]t the conclusion of a pre-trial hearing"). This Court's standard of review for the trial court's ruling on a motion to suppress is well settled:

the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. This Court must not disturb the trial court's conclusions if they are supported by the court's factual findings. However, the trial court's conclusions of law are fully reviewable on appeal. At a suppression hearing, conflicts in the evidence are to be resolved by the trial court. The trial court must make findings of fact resolving any material conflict in the evidence.

State v. McArn, 159 N.C. App. 209, 211-12, 582 S.E.2d 371, 373-74 (2003) (internal citations and quotation marks omitted). However, where there is no material conflict in the evidence presented at the suppression hearing, specific findings of fact are not required. *State v. Parks*, 77 N.C. App. 778, 781, 336 S.E.2d 424, 426 (1985), *disc. review denied*, 316 N.C. 384, 342 S.E.2d 904-05 (1986). "In that event, the necessary findings are implied from the admission of the challenged evidence." *State v. Leach*, 166 N.C. App. 711, 715, 603 S.E.2d 831, 834 (2004) (citation omitted).

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In the case *sub judice*, the trial court made what could be considered as findings of fact only that Micah was aware that he could request his parents to be present in his interview with Investigator Strickland, that he did not request them, and that he requested only his brother, who was permitted to be present. However, there was no material conflict in the evidence; the real legal issue is the adequacy of the juvenile Miranda rights advisement presented to Micah. We therefore review this issue *de novo*.

N.C. Gen. Stat. § 7B-2101 (2007) sets forth the required interrogation procedures for juveniles in a delinquency investigation. These are often referred to as the “Juvenile Miranda rights”:

(a) Any juvenile in custody must be advised prior to questioning:

- (1) That the juvenile has a right to remain silent;
- (2) That any statement the juvenile does make can be and may be used against the juvenile;
- (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
- (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

(b) When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile’s parent, guardian, custodian, or attorney. If an attorney is not present, the parent, guardian, or custodian as well as the juvenile must be advised of the juvenile’s rights as set out in subsection (a) of this section; however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile.

(c) If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that the juvenile does not wish to be questioned further, the officer shall cease questioning.

(d) Before admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile’s rights.

N.C. Gen. Stat. § 7B-2101 (emphasis added.)

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If a juvenile is subjected to custodial interrogation and he makes an incriminating statement, prior to use of the statement, the State must demonstrate that the juvenile was properly advised of his Juvenile Miranda rights and that he knowingly, willingly, and understandingly waived these rights. *Id.*

Further our Supreme Court has held:

An accused juvenile's rights during a custodial interrogation are codified in N.C.G.S. § 7B-2101, which states in part that '[a]ny juvenile in custody must be advised prior to questioning . . . [t]hat the juvenile has a right to have a parent, guardian, or custodian present during questioning.' N.C.G.S. § 7B-2101(a)(3) (2005) Before allowing evidence to be admitted from a juvenile's custodial interrogation, a trial court is required to 'find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights.' *Id.* § 7B-2101(d) (2005).

State v. Oglesby, 361 N.C. 550, 555, 648 S.E.2d 819, 822 (2007).

Both the State and Micah's counsel below apparently assumed that Micah was not free to leave during Investigator Strickland's questioning and that he was subject to a custodial interrogation, so that the juvenile Miranda warnings were required. However, the State first contends on appeal that Micah was not in custody and was not subjected to a custodial interrogation which would require juvenile Miranda warnings. The State argues:

[w]hether [Micah] was subjected to custodial interrogation is not an issue that was presented to the trial court for its consideration The focus of the evidence presented by [Micah] to support the motion to suppress was the nature of the rights explained to [Micah], not whether the advisement of those rights was legally required. The North Carolina Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.' *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)[.]

(emphasis added). This is true, but the State's argument defeats its own position. The State did not assert that Micah was not subject to custodial interrogation before the trial court and the State did not argue that juvenile Miranda warnings were not required. In its brief, the State claims that it

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argued that there was no requirement that a parent, guardian, or custodian be present because [Micah] was over the age of fourteen, that [Micah] was not in custody and that law enforcement did more than was required because of the serious nature of the allegations and in order to make [Micah] more comfortable.

(emphasis added.) However, our review of the transcript reveals that the State did not ever argue before the trial court that Micah was not in custody. In addition, the State did not present any evidence which would support a finding that Micah was not subject to a custodial interrogation. Although the court did not make findings of fact in the written order, the court's oral findings also presuppose a finding that Micah was subjected to a custodial interrogation which would require the juvenile Miranda warnings; the court found that the requirements of N.C. Gen. Stat. § 7B-2101 were met because Micah was aware that he had the right to have his parents present and that he was old enough to waive the right to have anyone else present.

We must therefore consider whether Micah knowingly, willingly, and understandingly waived his rights under N.C. Gen. Stat. § 7B-2101. The Miranda Rights form used by the Nash County Sheriff's department correctly stated Micah's Miranda rights, but did not accurately state his juvenile rights as provided by N.C. Gen. Stat. § 7B-2101, as the form provided that the juvenile had a "right to have a parent, guardian, custodian or *any other person* present during questioning." (emphasis added.) Investigator Strickland also advised Micah that he could have his parents, his brother, or "anybody basically" present during his questioning. N.C. Gen. Stat. § 7B-2101 provides only for a parent, guardian, or custodian to be present during questioning. When offered this choice of whom to have present, Micah did not waive his right to have someone present, as he could have done under N.C. Gen. Stat. § 7B-2101(b), but instead chose Bill, a person who was not a "parent, guardian, or custodian."

Although prior cases have addressed whether a juvenile has a right to have a person other than a parent, guardian, or custodian present, no case has directly addressed whether having a person who does not fall into one of these categories present is adequate under N.C. Gen. Stat. § 7B-2101.⁶ In *State v. Oglesby*, 361 N.C. 550, 648

6. In *State v. Jones*, 147 N.C. App. 527, 538, 556 S.E.2d 644, 651 (2001), *disc. review denied*, 355 N.C. 351, 562 S.E.2d 427 (2002), this court held that presence of a thirteen year old defendant's aunt satisfied the requirements of N.C. Gen. Stat. § 7A-595, because the defendant lived with his aunt, "was dependent upon her for room, board, education, and clothing", and the aunt was "defendant's guardian within

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S.E.2d 819 (2007) the juvenile requested to call his aunt during interrogation, and this request was denied. He challenged the admissibility of his incriminating statement on the grounds that he was denied his right under N.C. Gen. Stat. § 7B-2101 to have a parent, guardian, or custodian present. *Id.* at 555, 648 S.E.2d at 822. Although the juvenile's aunt was not legally the juvenile's custodian or guardian, he argued that she was effectively a guardian to him. *Id.* The Supreme Court rejected this argument:

An accused juvenile's rights during a custodial interrogation are codified in N.C.G.S. § 7B-2101, which states in part that '[a]ny juvenile in custody must be advised prior to questioning . . . [t]hat the juvenile has a right to have a parent, guardian, or custodian present during questioning.' N.C.G.S. § 7B-2101(a)(3) (2005) Before allowing evidence to be admitted from a juvenile's custodial interrogation, a trial court is required to "find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights." *Id.* § 7B-2101(d) (2005) Clearly, defendant was entitled by N.C.G.S. § 7B-2101(a) (3) to have a 'parent, guardian, or custodian' present during his interrogation. However, an 'aunt' is not an enumerated relation in the statute, and an interpretation of the term 'guardian' to encompass anything other than a relationship established by legal process would unjustifiably expand the plain and unambiguous meaning of the word. See *Black's Law Dictionary* 566 (abr. 7th ed. 2000) (defining 'guardian' as '[o]ne who has the legal authority and duty to care for another's person or property' (emphasis added)). We are bound by well-accepted rules of statutory construction to give effect to this plain and unambiguous meaning and we therefore decline any attempt to ascertain a contrary legislative intent. See, e.g., *In re A.R.G.*, 361 N.C. 392, 396, 646 S.E.2d 349, 351 (2007).

Id. at 555-56, 648 S.E.2d at 822.

Bill was not Micah's parent, custodian, or guardian. Micah lived with his mother and father, both of whom were actually present at the Sheriff's department on the day of the interrogation.

the spirit and intent of N.C.G.S. § 7A-595" However, the aunt was not the defendant's legally appointed guardian or custodian. *Id.* at 539, 556 S.E.2d at 652. The North Carolina Supreme Court in *State v. Oglesby* expressly held that a person in the position of a guardian could *not* be treated as a guardian for purposes of N.C. Gen. Stat. § 7B-2101, impliedly overruling *State v. Jones*. *State v. Oglesby*, 361 N.C. 550, 555-56, 648 S.E.2d 819, 822 (2007). However, there is no contention in the case *sub judice* that Bill ever acted as a guardian or custodian for Micah in any way.

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We must therefore consider the effect of the improper advisement that Micah had the right to have “any other person” present, where N.C. Gen. Stat. § 7B-2101(a)(3) specifically states the right to have a “parent, guardian, or custodian present[.]” The obvious purpose of giving a juvenile the right to have a “parent, guardian, or custodian” present during an interrogation is to help the juvenile understand his situation and the warnings he is being given so that he can make a knowing and intelligent decision about whether he should waive his right to be silent. Cases which have addressed this situation focus on the legal authority of the person over the juvenile. *See State v. Oglesby*, 361 N.C. 550, 648 S.E.2d 819 (2007); *State v. Jones*, 147 N.C. App. 527, 556 S.E.2d 644 (2001), *disc. review denied*, 355 N.C. 351, 562 S.E.2d 427 (2002). Even the Nash County form recognized the importance of the person’s legal authority over the juvenile, as it has a section for the signature of the parent, guardian, or custodian, if the child does choose to waive his rights, which certifies that the parent, guardian, or custodian understands the child’s rights and is “willing to have him/her make a statement and answer questions.” It further states that “I do not want an attorney for my child at this time. I understand and know what he/she is doing and voluntarily consent to have him/her answer your questions.” Bill did not have any legal authority to consent on behalf of Micah or Micah’s parents to permit Micah to answer questions or to waive his right to counsel. In fact, Bill did not attempt to exercise any authority over Micah, as he did not ask any questions, explain anything to Micah, or intervene in the interrogation in any way.

The State argues that Investigator Strickland “provided [Micah] with more that he was entitled to under the law,” as he was permitted to have his brother present, even though he was not a parent, guardian, or custodian. The State also properly notes that Micah, at age fifteen, could have been questioned without anyone present, if he waived his right. The fallacy in the State’s argument is that Investigator Strickland gave Micah an improper choice. If Investigator Strickland had advised Micah properly that his only options were to have a parent, guardian, or custodian present, to have an attorney present, or to talk to her alone, Micah would have had to make the decision either to talk to Investigator Strickland alone or to have his mother, his father, or both, or an attorney present. There is no way to know if he would have waived his rights and talked to Investigator Strickland alone or if he would have asked for one of his parents. He may have refused to talk to Investigator Strickland at all, or his parent may have prevailed upon Micah not to answer

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Investigator Strickland's questions, had a parent been present. The State argues that Investigator Strickland allowed Bill to be present "to make [Micah] more comfortable" Certainly, as a fifteen-year-old boy, Micah might have felt more comfortable with Bill present; he may have been embarrassed or even afraid for a parent to be present, given the subject matter of the questioning. However, the relevant concern is not Micah's comfort but that he be properly advised of his rights and that if he exercised his right to have someone present during his interrogation, that the person must be a parent, guardian, or custodian. In fact, trying to make Micah more "comfortable" could be construed as an effort to make him more willing to make harmful admissions to the law enforcement officer.

Our construction of N.C. Gen. Stat. § 7B-2101's requirements based upon its plain language—no more, no less—is in keeping with our Supreme Court's holding in *In re T.E.F.*, 359 N.C. 570, 614 S.E.2d 296 (2005). Although *T.E.F.* addressed different issues than this case, the Supreme Court stressed that the burden upon the State to ensure that a juvenile's rights are protected is greater than in the criminal prosecution of an adult. *Id.* at 575, 614 S.E.2d at 299. In *T.E.F.*, the Supreme Court reversed the trial court's acceptance of a juvenile's admission of delinquency in an adjudicatory hearing where the trial court failed to advise the juvenile specifically as to each of six required areas of inquiry under N.C.G.S. § 7B-2405 (2003). *Id.* The Supreme Court noted the "mandatory nature of the six requirements listed in N.C.G.S. § 7B-2407(a)" and rejected a "totality of the circumstances" test as may be applied in the context of a guilty plea by an adult defendant. *Id.* at 574-75, 614 S.E.2d at 298-99.

The Court went on to conclude:

We also recognize the fact that there are significant differences between adult criminal trials and juvenile proceedings. *In re Chavis*, 31 N.C. App. 579, 581, 230 S.E.2d 198, 200 (1976), *cert. denied*, 291 N.C. 711, 232 S.E.2d 203 (1977). Our courts have consistently recognized that "[t]he [S]tate has a *greater* duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution." *State v. Fincher*, 309 N.C. 1, 24, 305 S.E.2d 685, 699 (1983) (Harry Martin, J., concurring) (citing *In re Meyers*, 25 N.C. App. 555, 558, 214 S.E.2d 268, 270 (1975) (holding that in a juvenile proceeding, unlike an ordinary criminal proceeding, the burden upon the State to see that a juvenile's rights are protected is increased rather than decreased)).

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Id. at 575, 614 S.E.2d at 299. We hold that the trial court erred in denying Micah's motion to suppress his incriminating statements.

[3] Micah contends that if this Court finds that the trial court committed a statutory violation in denying his motion to suppress his statements then he was prejudiced by this error.

N.C. Gen. Stat. § 15A-1443(a) (2007) states

A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant

See *In re Butts*, 157 N.C. App. 609, 582 S.E.2d 279 (2003) (harmless error analysis under N.C. Gen. Stat. § 15A-1443(a) applicable to adjudication of delinquency), *appeal dismissed and disc. rev. improvidently allowed*, 358 N.C. 370, 595 S.E.2d 146 (2004) (per curiam). At his adjudication hearing, Micah entered an admission to one count of felonious sex offense with a child, only after the trial court denied his motion to suppress his statements. The only evidence introduced at the adjudication hearing was Investigator Strickland's brief summary of the statements given by Jake, the nine-year-old victim, and statements given by Micah in which he admitted to all of the charges against him. The record does not show that any physical evidence was presented, and no expert testimony was offered by the State regarding the charged offenses. Jake's statements provided evidence of the crime, but the introduction of Micah's own statements provided much more evidence of guilt. As stated above, Micah's statements were admitted as a result of a statutory violation of N.C. Gen. Stat. § 7B-2101. Without the admission of these statements, the State's case would have been much weaker and Micah may not have admitted to any of the charges against him or the court may have found insufficient evidence to adjudicate Micah delinquent. We hold that Micah has met his burden of showing that there was a reasonable possibility a different result would have been reached had he been properly advised of his rights, and this error was prejudicial to Micah.

We therefore hold that the trial court erred by denying Micah's motion to suppress his incriminating statement because his waiver was not made "knowingly, willingly, and understandingly" where he was advised incorrectly as to his right to have a person who was

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not his parent, guardian, or custodian present during his custodial interrogation, and he chose to have his brother Bill present. Since we find that this statutory error was prejudicial to Micah, we reverse the order denying Micah's motion to suppress, vacate the order adjudicating him as delinquent, and remand to the trial court for further proceedings.

Because we hold that the statement is inadmissible under N.C. Gen. Stat. § 7B-2101, we need not address Micah's constitutional arguments that admission of his statement was in violation of his rights under the 5th, 6th, or 14th Amendments to the United States Constitution.

Reverse and Remand.

Judges WYNN and BEASLEY concur.

JERRY ALAN REESE, AS A TAXPAYER AND CITIZEN IN AND OF MECKLENBURG COUNTY, NORTH CAROLINA, ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS AND CITIZENS OF MECKLENBURG COUNTY, PLAINTIFF V. MECKLENBURG COUNTY, NORTH CAROLINA; AND KNIGHTS BASEBALL, LLC, DEFENDANTS

No. COA08-1417

(Filed 3 November 2009)

1. Counties— bonds—professional baseball stadium

The County's use of the proceeds of a bond issue to acquire land for a professional baseball stadium complied with N.C.G.S. § 159-48(c)(4b). Since the County is authorized to issue bonds for the construction of stadiums and arenas, the purchase of land for that use is a county corporate purpose under the statute.

2. Counties— professional baseball stadium—acquisition and use of land

The County's statutory authority to acquire and use land includes the operation of a proprietary professional baseball stadium. The fact that the County chose to achieve the goal of erecting a downtown baseball stadium by leasing the land and having a private party shoulder the bulk of the expense for the stadium does not mean that the transaction fails to serve a public purpose.

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3. Counties—bonds—public parks—funds restricted—particular property not restricted

Proposed ballot language for public park bonds was not intended to preclude use of property as a professional baseball stadium and there was not a substantial deviation from the purpose for which the bonds were proposed.

4. Counties—professional baseball stadium—leases—statutory authority

Leases of property by a county for a professional baseball stadium were not voided based on the argument that N.C.G.S. § 160A-266 and -272 do not expressly allow the leasing of real property.

5. Counties—professional baseball club—lease—notice of terms

The County properly published notice of the terms of a lease with a professional baseball club where plaintiff argued that the transaction of which notice was given substantially differed from the final version. The final version did not alter any of the material obligations between the parties.

6. Injunctions—preliminary—no showing of success on merits

The trial court correctly denied a preliminary injunction in a case involving a county's transaction with a professional baseball club. Plaintiff did not show a likelihood of success on the merits.

Appeal by plaintiff from order filed 28 July 2008 by Judge W. David Lee in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 April 2009.

Jerry Alan Reese, pro se.

Robinson, Bradshaw & Hinson, P.A., by A. Ward McKeithen and Jonathan C. Krisko, for defendant-appellee Mecklenburg County, North Carolina.

Hamilton Moon Stephens Steele & Martin, PLLC, by Jackson N. Steele, for defendant-appellee Knights Baseball, LLC.

STEELMAN, Judge.

The trial court properly denied plaintiff's motion for judgment on the pleadings and granted defendants' motions for judgment on the pleadings. The lease of property acquired under the Landbanking Statute (N.C. Gen. Stat. § 159-48(c)(4b)) for a professional baseball

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stadium is permitted as a county corporate purpose. Recreational facilities do not lose their public purpose merely because a private party is involved. When the 2004 Park Bond only restricted the expenditure of bond proceeds on a stadium for professional baseball, and the disbursed money was subsequently repaid, there was no substantial deviation from the purpose for which the bonds were approved. Mecklenburg County, by special legislation, has authority to lease its property. None of the changes to the 18 March 2008 Lease altered any material conditions of the lease, and the notice published prior to December 2007 was legally sufficient. Plaintiff did not show a likelihood of success on the merits of his case, and the trial court properly denied his motion for a preliminary injunction.

I. Factual and Procedural Background

Charlotte's Center City is divided into four quadrants by two intersecting streets, Trade Street and Tryon Street. These four quadrants are called "Wards." This case pertains to a 7.8 acre tract (the Property) in Third Ward and challenges the validity of a ground lease between Mecklenburg County (County) and Knights Baseball (Knights), a AAA minor league baseball franchise.

In August 1999, the Mecklenburg County Board of Commissioners (Board) adopted a resolution calling for a voter referendum on the proposed issuance of general obligation bonds in a maximum amount of \$220,000,000.00 for the purpose of "providing land for present or future county corporate, open space, community college, and public school purposes" On 2 November 1999, the referendum was approved by the voters of Mecklenburg County, and County caused bonds (the 1999 Land Bonds) to be issued.

On 9 October 2001, the Board adopted a resolution to authorize the acquisition of the Property using \$24,000,000.00 of the proceeds of the 1999 Land Bonds. County purchased the Property with the intent to use it for a public park. At the time of purchase, the "2010 Center City Vision Plan" (2010 Vision Plan) designated the Property to be used as a public park. On 13 July 2004, County Manager Harry L. Jones (Jones) recommended to the Board that a bond referendum be submitted to the voters of Mecklenburg County, authorizing \$69,000,000.00 in general obligation bonds for parks and recreation facilities. Jones recommended that \$24,000,000.00 in bond proceeds be used to develop a park on the Property.

At the 10 August 2004 Board meeting, Donald C. Beaver (Beaver), CEO of the Knights, asked the Board to consider making the Property

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available to the Knights for use as a baseball stadium. The Board voted to refer Beaver's request to the Board's Baseball Committee for further consideration. On 2 November 2004, the voters approved the \$69,000,000.00 bond referendum (2004 Park Bonds) upon the following ballot question:

SHALL the order authorizing \$69,000,000 of bonds secured by a pledge of the faith and credit of the County of Mecklenburg to pay capital costs of providing park and recreation facilities (other than a stadium for professional baseball), including the acquisition and construction of new park and recreation facilities, the improvement and expansion of existing park and recreation facilities and the acquisition and installation of furnishings and equipment and the acquisition of interests in real property required therefor, and a tax to be levied for the payment thereof, be approved?

On 19 January 2005, the Board adopted the "Parks and Recreation Approved in November 2, 2004 Referendum Capital Project Ordinance," (Park Bond Ordinance) to provide funds for improvements to existing park facilities and "Public/Private projects excluding a stadium for professional baseball." On 20 December 2005, the Board adopted an amendment to the Park Bond Ordinance, which appropriated an additional \$5,000,000.00 from the 2004 Park Bonds.

In 2005 and early 2006, County spent a total of \$366,280.23 from the 2004 Park Bonds consisting approximately of \$290,000.00 for master site plan design work for a park on the Property and approximately \$78,000.00 for temporary beautification on the Property, including grading and lawn seeding. On 8 November 2006, the Board approved a "land swap" transaction (Land Swap), which provided for the purchase and sale of several pieces of real property within the City of Charlotte (City). The Board further directed Jones to "negotiate and bring back a proposed interlocal agreement with the City of Charlotte for Board approval," which would make the Property available for a professional baseball stadium. On 19 December 2006, the Board adopted another amendment to the Park Bond Ordinance, appropriating an additional \$19,000,000.00 from the 2004 Park Bonds. That same day, the Board authorized its Chairman to execute a non-binding Memorandum of Understanding with the Knights for the development of a minor league professional baseball stadium.

A Memorandum of Understanding pertaining to site development, and stadium design and construction was executed by the Knights on

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25 January 2007 and the County on 31 January 2007. On 14 May 2007, County and City entered into a “Brooklyn Village/Knights Baseball Stadium Interlocal Cooperation Agreement,” which provided:

Within 120 days after City transfers title to the Conveyed Properties to the County, the County and the Knights shall [enter] into a legally binding Lease Agreement to develop the Baseball Stadium

On 10 July 2007, the Board amended the Park Bond Ordinance to reimburse the funds issued from the 2004 Park Bonds, which were “expended on the Third Ward Park site that is under consideration to be leased for a minor league baseball stadium,” by transferring \$370,000.00 from County’s general fund.

In September 2007, City, at the request of County, amended the 2010 Vision Plan to provide for a public park at another site and a professional baseball stadium on the Property. On 20 November 2007, County and the Knights executed a Development and Economic Grant Agreement (Development Agreement) detailing specifics on how the baseball stadium would be developed, operated, and financed. The Development Agreement provided that County would have no obligation to enter into the Lease until nine specific conditions had been satisfied, any of which could be waived in writing by County. On 21 December 2007, County published a legal notice of its intent to enter into the lease in *The Charlotte Observer*.

By 18 March 2008, seven of the nine conditions had been satisfied; leaving two conditions as follows:

(i) the County has secured record title or has received assurances reasonably satisfactory to the County that it will be able to secure title to all land required for the Third Ward Park;

. . .

(viii) all conditions precedent to the closing of the Project Financing have been met and the Project Financing is prepared to be closed; and

On 18 March 2008, the Board adopted a resolution, which permitted the waiver of the remaining two conditions (i and viii) precedent to executing the lease between County and the Knights. The resolution called for the lease to be amended by adding a new section 3.2, which would allow the remaining two conditions (i and viii) to be satisfied after execution of the lease but before the Knights began construc-

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tion on the baseball stadium. That same day, County and the Knights entered into a lease (the Lease), which conveyed a leasehold interest in the Property for an initial term of forty-nine years with two consecutive renewal terms of twenty-five years each. The Knights were to pay nominal rent of \$1.00 per year and construct a stadium with a minimum of 10,000 seats, and must operate its minor league baseball franchise on the Property. The Knights would own all of the improvements constructed on the Property during the term of the Lease, and the improvements would revert to County at the end of the Lease. On 20 March 2008, the Lease was filed in the Mecklenburg County Register in Book 23527, pages 450-622.

On 25 March 2008, plaintiff filed a Verified Complaint and Motion for a Temporary Restraining Order and Preliminary Injunction in Mecklenburg County Superior Court against County and the Knights (collectively defendants). On 2 April 2008, plaintiff filed an amended complaint seeking a judgment that the Lease be declared void, a temporary restraining order prohibiting defendants from performing the Lease, a preliminary injunction prohibiting defendants from performing the Lease, and a permanent injunction prohibiting defendants from performing the Lease. On 7 April 2008, this case was designated as an exceptional case by the Chief Justice pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts. On 24 April 2008, County and the Knights filed answers to plaintiff's amended complaint. On 8 May 2008, defendants filed Motions for Judgment on the Pleadings. On 9 May 2008, plaintiff filed a Notice of *Lis Pendens* on the Property. On 13 May 2008, defendants filed Amendments to Motions for Judgment on the Pleadings.

On 13 May 2008, the trial court entered an order denying plaintiff's motion for a preliminary injunction. On 21 May 2008, plaintiff filed a Motion for Judgment on the Pleadings. On 28 July 2008, the trial court filed an order, denying plaintiff's motion for judgment on the pleadings but granting defendants' motions, and dismissing plaintiff's amended complaint with prejudice and cancelling plaintiff's Notice of *Lis Pendens*.

Plaintiff appeals.

II. Judgment on the Pleadings

Plaintiff contends that the trial court erred in denying his motion for judgment on the pleadings and in granting defendants' motions for judgment on the pleadings. We disagree.

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Under Rule 12(c) of the North Carolina Rules of Civil Procedure, judgment on the pleadings is “appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain. Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party.” *Shehan v. Gaston Cty.*, 190 N.C. App. 803, 806, 661 S.E.2d 300, 303 (2008) (citing *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 765 (2008)). In deciding such a motion, the trial court looks solely to the pleadings. *Wilson v. Development Co.*, 276 N.C. 198, 206, 171 S.E.2d 873, 878 (1970). The trial court can only consider facts properly pleaded and documents referred to or attached to the pleadings. *Id.*, 171 S.E.2d at 878-79 (citations omitted).

A. Standard of Review

This Court reviews *de novo* a trial court’s ruling on motions for judgment on the pleadings. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005) (citations omitted), *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court. *Peninsula Prop. Owners Ass’n v. Crescent Res., LLC*, 171 N.C. App. 89, 92 614 S.E.2d 351, 353 (2005) (citing *In re Appeal of the Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)), *appeal dismissed and disc. review denied*, 360 N.C. 177, 626 S.E.2d 648 (2005).

B. North Carolina County Landbanking Statute

[1] In his first argument, plaintiff contends that the Property was acquired with proceeds of a bond issue approved by voters in 1999 under the provisions of N.C. Gen. Stat. § 159-48(c)(4b), and that the use of this property for a professional baseball stadium does not comply with the statute. We disagree.

N.C. Gen. Stat. § 159-48(c) provides:

(c) Each county is authorized to borrow money and issue its bonds under this Article in evidence of the debt for the purpose of, in the case of subdivisions (1) through (4b) of this subsection, paying any capital costs of any one or more of the purposes . . . :

(4b) Providing land for present or future county corporate, open space, community college, and public school purposes.

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N.C. Gen. Stat. § 159-48(c)(4b) (2007). This provision allows for the acquisition and holding of land for both present and future county corporate purposes.

Plaintiff contends that subsection (4b) limits the acquisition of land under that provision to the specific four purposes set forth in the statute. He then further argues that these four purposes are further restricted to those set forth in N.C. Gen. Stat. § 153A-158 (use by county agency); N.C. Gen. Stat. § 153A-158.1 (use by schools); N.C. Gen. Stat. § 153A-158.2 (use by a community college); N.C. Gen. Stat. § 160A-403 (open space and conservation easements); and Article XV, section 5 of the North Carolina Constitution (nature and historic preservation). We hold that the provisions of N.C. Gen. Stat. § 159-48(c)(4b) are not restricted by the statutes enumerated by plaintiff. Rather, resolution of this issue hinges upon whether “county corporate purposes” is broad enough to encompass the use of the Property as a professional baseball stadium. We hold that it is.

Instead of looking for guidance as to the meaning of “county corporate purposes” in varied and different statutes pertaining to local governmental units, we look to the same statute that contains the landbanking provision in question. N.C. Gen. Stat. § 159-48(b) provides:

(b) Each county and city is authorized to borrow money and issue its bonds under this Article in evidence thereof for the purpose of paying any capital costs of any one or more of the following:

(13) Providing parks and recreation facilities, including without limitation land, athletic fields, parks, playgrounds, recreation centers, shelters, stadiums, arenas, permanent and temporary stands, golf courses, swimming pools, wading pools, marinas, and lighting.

Clearly if a county is authorized to issue bonds for the construction of stadiums and arenas, then the purchase of land for such an objective is a county corporate purpose under the provisions of N.C. Gen. Stat. § 159-48(c)(4b).

This argument is without merit.

C. Property for Park and Recreation Purposes

[2] In his second argument, plaintiff contends that County only had statutory authority to purchase the Property for parks and recre-

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ational programs. Plaintiff argues that County's authority to acquire and use land under N.C. Gen. Stat. §§ 160A-352; -353, and N.C. Gen. Stat. § 153A-444 does not include the operation of a professional baseball stadium because it is a proprietary venture for pecuniary gain. We disagree.

The trial court concluded:

18. The County's acquisition and use of the Property for a stadium is within its authority under N.C.G.S. § 160A-352 and -353 and within its authority to acquire real property under N.C.G.S. § 153A-158 and to contract with private parties to carry out any public purpose the county is authorized by law to engage in under N.C.G.S. § 153A-449.

N.C. Gen. Stat. § 160A-353, which is made applicable to counties by N.C. Gen. Stat. § 153A-444, empowers counties to acquire real property and appropriate funds for parks and recreational purposes. N.C. Gen. Stat. § 160-353 (2007); *see also* N.C. Gen. Stat. § 153A-444 (2007) (A county may establish parks and provide recreational programs pursuant to Chapter 160A, Article 18). Recreation is defined as "activities that are diversionary in character and aid in promoting entertainment, pleasure, relaxation, instruction, and other physical, mental, and cultural development and leisure time experiences." N.C. Gen. Stat. § 160A-352 (2007). As noted above, N.C. Gen. Stat. § 159-48 provides that counties are authorized to borrow money and issue bonds for the purpose of paying capital costs of "[p]roviding parks and recreation facilities, including without limitation land, athletic fields, parks, playgrounds, recreation centers, shelters, *stadiums*, arenas, permanent and temporary stands, golf courses, swimming pools, wading pools, marinas, and lighting." N.C. Gen. Stat. § 159-48(b)(13) (2007) (emphasis added). This statutory provision expressly provides that parks and recreation facilities include stadiums.

Plaintiff cites *Britt v. Wilmington*, 236 N.C. 446, 73 S.E.2d 289 (1952) for the proposition that the operation of a professional baseball franchise is not a legitimate and traditional governmental function. Plaintiff asserts this case holds that a city "may not lease its system of on-street parking meters for operation by a private corporation or individual." The holding in *Britt* was that the city's parking management program was unlawful because the city combined its on-street and off-street parking programs, and the collected on-street

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finances were not allocated to a proper use. *Britt* does not address a municipality's power to lease public property to private parties.

We further note neither N.C. Gen. Stat. §§ 160A-352; -353, nor N.C. Gen. Stat. § 153-444 prohibit recreational facilities from being operated for a pecuniary gain. The statutes do not require, as plaintiff suggests, that County receive generated revenues from or participate in the commercial development of the professional baseball stadium for it to be considered a use for a public purpose. In fact, counties are given wide latitude to contract with private parties "in order to carry out any public purpose that the county is authorized by law to engage in." N.C. Gen. Stat. § 153A-449 (2007). In *Peacock v. Shinn*, this Court held that agreements between the City of Charlotte and the Charlotte Hornets for the Hornets to use the Charlotte Coliseum constituted a public purpose. 139 N.C. App. 487, 533 S.E.2d 842, *appeal dismissed and disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000). In *Peacock*, we stated that in determining whether a municipality has acted with a public purpose, the two relevant questions were: "(1) whether the action 'involves a reasonable connection with the convenience and necessity of the particular municipality,' and (2) whether the action 'benefits the public generally, as opposed to special interests or persons.'" *Id.* at 492, 533 S.E.2d at 846 (citing *Maready v. City of Winston-Salem*, 342 N.C. 708, 722, 467 S.E.2d 615, 624 (1996)). As to the first question, we held that operation of a public auditorium/coliseum has long been considered to be for a public purpose. *Id.* at 493, 533 S.E.2d at 847. As to the second question, we held that use of the Coliseum by a successful, competitive home basketball team benefitted the general public. *Id.* at 495, 533 S.E.2d at 848.

We believe this same reasoning applies to the construction of a stadium for a professional baseball team. The fact that County chose to achieve the goal of erecting a downtown baseball stadium by the lease of land, and having a private party shoulder the bulk of the expense for the stadium, does not mean that the transaction fails to serve a public purpose. The lease transaction achieves the proper governmental purpose of erecting a stadium as a recreational facility.

This argument is without merit.

D. Restriction on the Use of Property

[3] In his third argument, plaintiff contends that the proposed ballot language for the 2004 Park Bonds, which was adopted by the Board and approved by voters, was intended to preclude the use of the Property as a professional baseball stadium. We disagree.

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At the time of the 2004 Park Bonds authorization, the 2010 Vision Plan called for the Property to be used as a public park. The 2004 Park Bond language submitted to voters read: "SHALL the order authorizing \$69,000,000 of bonds secured by a pledge of the faith and credit of the County of Mecklenburg to pay capital costs of providing park and recreation facilities (other than a stadium for professional baseball)" The County Manager proposed that \$24,000,000.00 of the bond proceeds be used to build a public park on the Property. Plaintiff argues that the 2004 Park Bonds Authorization imposes a limitation on the use of the Property solely for a public park.

The trial court concluded:

22. The expenditure of \$366,280.23 in proceeds from bonds issued pursuant to the 2004 Park Bond Authorization for park planning and limited grading and seeding on the Property when the County planned to use the Property for a public park, and the subsequent replenishment of such proceeds by transfer of \$370,000 from the County General Fund to the 2004 Park Bond Capital Project Ordinance, does not restrict the use of the Property by the County.

We first note that the only limitation contained in the language of the referendum was on the expenditure of bond proceeds. There was no restriction as to the Property where the funds were to be expended, nor was there any restriction on how a particular piece of real estate in question was to be used. The Property was acquired by proceeds from the 1999 Land Bonds, not the 2004 Park Bonds. The 2004 Park Bond Authorization language restricted only the expenditure of bond proceeds on a stadium for professional baseball. *See* N.C. Gen. Stat. § 159-135 (2007) (the proceeds of the sale of a bond issue shall be applied only to the purposes for which the issue was authorized).

Plaintiff cites *Wishart v. Lumberton*, 254 N.C. 94, 118 S.E.2d 35 (1961) for the proposition that because County purchased the Property with the initial intent to use it as a public park, this Court must enjoin County from using it for anything else. This case is not apposite. In *Wishart*, the subject property had been dedicated for use as a public park by express authorization from the 1925 Legislature and had been used as a park for thirty years. *Wishart* dealt with the abandonment of property which had been permanently dedicated as a public park. *Id.* In the instant case, the General Assembly has not dedicated the Property for any specific use, nor has County ever used the Property for a public park. Further, N.C. Gen. Stat. § 160A-265,

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made applicable to counties by N.C. Gen. Stat. § 153A-176, states that counties may: “(i) hold, use, change the use thereof to other uses, or (ii) sell or dispose of real and personal property, without regard to the method or purpose of its acquisition or to its intended or actual governmental or other prior use.” N.C. Gen. Stat. § 160A-265 (2007); N.C. Gen. Stat. § 153A-176 (2007).

Our Supreme Court has discussed the limits which a bond authorization imposes on local government in *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971). In *Sykes*, the Charlotte City Council submitted a bond referendum to voters for the construction of a civic center on Brevard Street. After voter approval, the plan was changed to construct the civic center on Trade Street. The plaintiffs’ principal contention was that the voters did not approve the issuance of bonds for a civic center at any place other than the Brevard Street site, and the bond issue was approved on the basis of misleading representations made in public speeches and through the news media that the civic center would be located on the Brevard Street site. Our Supreme Court noted that North Carolina permits the use of broad and general ballots in bond elections. *Id.* at 114, 179 S.E.2d at 444. In jurisdictions which permit the use of broad and general referendum ballots, “in determining whether there have been misrepresentations sufficient to void the bond election, the courts have consistently looked to the notice of election, the ballot, and the ordinance authorizing the issuance of bonds, i.e., matters which constitute official proceedings in connection with the bond issue.” *Id.* The Supreme Court noted that neither “the ballot, ordinance, nor any official action mentioned the location of the civic center.” *Id.* at 108, 179 S.E.2d at 440. The Supreme Court upheld the denial of plaintiffs’ request for an injunction and held that that there was no substantial deviation from the purpose for which the bonds were proposed and that misrepresentations made as to the site did not give rise to an estoppel or vitiate the question submitted to voters.

In the instant case, the 2004 Park Bonds did not require County to construct a public park on the Property. The 2004 Park Bonds merely restricted the expenditure of bond proceeds for the capital costs of a professional baseball stadium. While County did spend \$366,280.23 from the 2004 Park Bonds for master site plan design work for a park and temporary beautification on the Property, this money was subsequently reimbursed from County’s general fund.

These transactions did not create an irrevocable dedication of the Property for use as a public park. None of the proceeds of the

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2004 Park Bonds have been used for the Property or the professional baseball stadium project. The trial court found, “No proceeds of the 2004 Park Bonds are being applied to or invested in the Property.” A public park is still going to be constructed, but it will be at another site. There is no substantial deviation from the purpose for which the bonds were proposed.

This argument is without merit.

E. County’s Statutory Authority to Enter into a Lease of Property

[4] In his fourth argument, plaintiff contends that the Lease should be voided because N.C. Gen. Stat. §§ 160A-266(d) and -272 do not expressly allow the leasing of real property. We disagree.

The trial court concluded:

19. The County is authorized to enter into the Lease pursuant to authority vested in the County by N.C.G.S. § 160A-266(d).

20. The County has substantially complied with the requirements of N.C.G.S. § 160A-266(d) applicable to the County.

N.C. Gen. Stat. § 160A-266, applicable to Mecklenburg County by virtue of 2000 N.C. Sess. Laws 65, provides:

(d) When the board of commissioners determines that a sale or disposition of property will advance or further any county or municipality-adopted economic development, transportation, urban revitalization, community development, or land-use plan or policy, the county may, in addition to other authorized means sell, exchange or *transfer the fee or any lesser interest in real property*, either by public sale or by negotiated private sale.

2000 N.C. Sess. Laws 65 (Local Act) (emphasis added). This special legislation gives County the authority to lease its property. A leasehold is an interest in land. *Piedmont Triad Reg’l Water Auth. v. Lamb*, 150 N.C. App. 594, 596, 564 S.E.2d 71, 73 (2002) (citing N.C. Gen. Stat. § 40A-2(7)), *cert. denied and disc. review denied*, 356 N.C. 166, 568 S.E.2d 608 (2002).

Plaintiff contends that the Local Act applies only to sales of real property and excludes leases. This construction is not supported by the clear terms of the statute, which allows for the transfer of “any lesser interest in real property.”

Further, N.C. Gen. Stat. § 160A-272, made applicable to counties through N.C. Gen. Stat. § 153A-176, provides “[l]eases for terms of

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more than 10 years shall be treated as a sale of property and may be executed by following any of the procedures authorized for sale of real property.” N.C. Gen. Stat. § 160A-272 (2007)¹; N.C. Gen. Stat. § 153A-176 (2007). The Lease between County and the Knights is for longer than ten years and is thus by statute treated as a sale between the two parties.

This argument is without merit.

F. Notice

[5] In his fifth argument, plaintiff contends that County failed to publish notice of the terms of the Lease actually entered into with the Knights. Plaintiff argues that N.C. Gen. Stat. § 160-266(d), made applicable by the Local Act, requires the publication of notice ten days prior to the adoption of the proposed resolution. We disagree.

The Local Act provides:

Notice of the proposed transaction shall be given at least 10 days prior to adoption of the resolution by publication in a newspaper of general circulation, generally describing:

- (1) The property involved;
- (2) The nature of the interest to be conveyed; and
- (3) All of the material terms of the proposed transaction, including any covenants, conditions, or restrictions which may be applicable.

2000 N.C. Sess. Laws 65.

County published notice of its intent to enter into the Lease on 21 December 2007. The Lease was signed and approved on 18 March 2008. Plaintiff argues that the transaction noticed in December was substantially different than the transaction entered into on 18 March because the final version of the Lease “added several new conditions for the Knights’ ability to commence construction and also permitted the County Manager to waive conditions rather than by vote of the Board.”

The 18 March Lease did not alter any of the material obligations between County and the Knights. The only difference between the 21 December 2007 lease and the 28 March 2008 lease is that the two conditions, which County could require before entering into the Lease,

1. N.C. Gen. Stat. § 160A-272 was amended by 2009 N.C. Sess. Laws 149; however, the quoted section was not altered. The amendment has no bearing on this case.

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were waived and made a provision under the Lease requiring satisfaction before the Knights could begin construction on the baseball stadium. Neither of these two conditions altered the obligations of either County or the Knights. The Lease still requires that these conditions be satisfied before construction can begin.

This argument is without merit.

III. Preliminary Injunction

[6] In his sixth argument, plaintiff contends that the trial court erred when it denied his motion for a preliminary injunction. We disagree.

A preliminary injunction “is an extraordinary measure taken by a court to preserve the *status quo* of the parties during litigation.” *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). A plaintiff must show: 1) a likelihood of success on the merits, and 2) that plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the Court’s opinion, issuance is necessary for the protection of plaintiff’s rights during the course of litigation. *Id.* (citations omitted).

As we have discussed above, plaintiff did not show a likelihood of success on the merits of this case.

This argument is without merit.

IV. Conclusion

The use of property acquired under N.C. Gen. Stat. § 159-48(c)(4b) for a professional baseball stadium is permitted as a county corporate purpose. County had authority to use land for the operation of a professional baseball stadium even though it involved the construction and operation of the stadium by a private party. There was no substantial deviation from the purpose for which the 2004 Park Bonds were approved. A leasehold is an interest in land, and 2000 N.C. Sess. Laws 65 gives County the authority to transfer any lesser interest in real property. Because the 18 March 2008 lease did not alter the obligations between County and the Knights, the notice published by County was legally sufficient. The trial court properly denied plaintiff’s motion for a preliminary injunction because he did not show a likelihood of success on the merits of his case.

AFFIRMED.

Chief Judge MARTIN and Judge CALABRIA concur.

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STATE OF NORTH CAROLINA v. MARIO ELLIOTT STOVER

No. COA09-229

(Filed 3 November 2009)

1. Sentencing— active sentence completed—mootness

Defendant's argument that the active portion of his sentence exceeded statutory limits was moot where defendant had completed the sentence and did not argue collateral adverse legal circumstances.

2. Search and Seizure— olfactory recognition of marijuana—defendant fleeing—probable cause and exigent circumstances

The trial court did not err by admitting marijuana and drug paraphernalia found in defendant's house where officers had both probable cause and exigent circumstances to enter the house. An officer's olfactory recognition of marijuana is as reliable as an officer's visual recognition and defendant was partially out of a window in the back of the house when officers arrived.

3. Search and Seizure— voluntariness—evidence sufficient

Even though the facts were not entirely consistent, the evidence was sufficient to support the trial court's determination that defendant voluntarily consented to a search of his house.

4. Confessions and Incriminating Statements— pre-Miranda statements—not solicited

The trial court properly denied defendant's motion to suppress his pre-*Miranda* statements to officers where there was competent evidence for the court to find and conclude that defendant's comments were not solicited and were not products of interrogation by police.

Judge STEELMAN concurring.

Appeal by defendant from judgments entered 15 August 2008 by Judge C. Preston Cornelius in Buncombe County Superior Court. Heard in the Court of Appeals 2 September 2009.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Daniel S. Johnson, for the State.

Leslie C. Rawls, for defendant-appellant.

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JACKSON, Judge.

Mario Elliott Stover (“defendant”) appeals his 15 August 2009 convictions for misdemeanor possession of drug paraphernalia; felony maintaining a dwelling for using a controlled substance, marijuana; and possession with intent to sell and deliver marijuana. For the reasons stated below, we affirm.

During a traffic stop on 10 January 2008, Asheville police officers Maltby and Dotson noticed a passenger in the car attempt to put a bag of marijuana into her pocket. The officers asked her about the drugs, and she (“informant”) described to them the house at which she had purchased the marijuana. Officer Maltby then radioed other officers from the Drug Suppression Unit to go to the house and conduct a “knock and talk.” At this point the officers did not have a search warrant for the house nor did they have sufficient evidence for a search warrant. Officer Brown, accompanied by Officers Crisp and Breneman, used the description that the informant had provided to Officer Maltby to identify 218 Fayetteville Street, defendant’s residence.

When they exited their vehicles, Officers Crisp and Brown perceived a “strong odor of marijuana,” which grew stronger as they approached the house. Officer Crisp heard a noise at the rear of the house and entered the backyard, where he observed a black male whose entire upper torso was out of a window. Defendant argues that he was looking out of the window because his neighbor had called to him, and defendant’s neighbor testified that defendant was at the window but was not “hanging out” of it, as described by the police. Officer Crisp drew his gun and aimed it at defendant, which he stated was a precaution because narcotics cases often involve weapons. Defendant said, “Don’t shoot me. I’m not going anywhere.” Officer Crisp asked defendant his name to which defendant replied, “Mario Stover.” The officer then lowered his gun but did not holster it.

Officer Crisp radioed to Officers Brown and Breneman that he had a subject hanging out a back window. Officer Breneman joined Officer Crisp in the backyard. Officer Breneman asked Officer Crisp if everything was okay, and defendant stated, “Yeah, everything’s just fine. I’ve just got weed. I’ve got weed.” Officer Crisp asked defendant why he was hanging out of the window, to which defendant responded, “Man, I’ve got some weed.” Officer Crisp asked whether that was the only reason that defendant was hanging out of the window, and defendant responded, “Yeah, that’s the only reason. I have a

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lot. It's right here beside me. Come and get it." Officer Crisp told defendant not to go anywhere and that an officer would be entering through the front door.

Officer Brown then kicked in the front door and went to the back of the house where defendant was located. He walked through a bedroom, in which there was a small child, and into the bathroom where defendant was located. He pulled defendant back inside. Officer Brown patted down and frisked defendant and told the other officers that they could come inside. Defendant and an officer went to the living room while the other officers conducted a protective sweep of the house. Defendant was not handcuffed. Officer Brown walked defendant across the street and back in order that he could ask his neighbors to care for the child. During the protective sweep, officers observed sandwich bags, digital scales, and marijuana in several locations. These items were in plain view. The officers also searched areas that were large enough for a person to hide and did not move any furniture.

Officers Maltby, Dotson, and Ward then arrived on the scene. They also smelled a strong odor of marijuana, which increased as they approached the house. When the officers entered the house, defendant was in the living room. According to Officer Maltby, defendant was a known street-level dealer in the area. While in the living room, defendant stated that he had been selling marijuana for years and knew it was about time for him to be caught. He also said that he sells "weed" to feed his children but does not sell crack cocaine or rob people. Officer Maltby placed defendant in handcuffs and read him his *Miranda* rights. Defendant waived those rights.

Officer Crisp advised defendant that he was going to bring his drug-sniffing dog into the bathroom, based upon defendant's earlier comment that he had "weed" in the bathroom with him. Defendant said, "Okay." Officer Crisp's dog alerted to the bathtub, where two gallon bags containing a green leafy substance were located. The dog also alerted to the front bedroom. Officers Brown and Ward each asked defendant if they could search the rest of the house, and defendant consented. Following this consent, Officer Crisp's dog alerted to the chest-of-drawers in the front bedroom and to the closet door. Officers Brown, Ward, and Dotson searched the house. They collected approximately 384 grams of marijuana in several bags from the bathroom tub, the bedroom closet, a living room chair, and the top of the dresser in the front bedroom; digital scales and sandwich bags from the living room and front bedroom; and \$2,072.00 in

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cash from the front bedroom. Defendant was cooperative throughout this time.

Defendant was charged with (1) resisting a public officer, (2) misdemeanor possession of drug paraphernalia, (3) felony maintaining a dwelling for using a controlled substance, marijuana, and (4) possession with intent to sell and deliver marijuana. The prosecutor dismissed the resisting a public officer charge. Defendant was indicted by a grand jury for the remaining charges. He filed a motion to suppress the items seized in the search of his residence and the statements he made on the arrest day, 10 January 2008. Defendant reserved the right to appeal if he subsequently pled guilty. On 15 August 2008, the trial court denied the motion to suppress. Defendant then pled guilty to all three charges. Pursuant to his plea agreement, defendant's three offenses were consolidated into one judgment. The trial court sentenced him to six to eight months in prison. This sentence was suspended, with an intermediate sanction of a term of special probation of four months in the Department of Corrections. Defendant appeals.

[1] Defendant first argues that his active jail sentence of four months exceeded the statutory limit imposed by North Carolina General Statutes, section 15A-1351(a). Because we regard this issue as moot, we do not address it.

Generally, “ ‘this Court will not hear an appeal when the subject matter of the litigation . . . has ceased to exist.’ ” *In re Swindell*, 326 N.C. 473, 474, 390 S.E.2d 134, 135 (1990) (quoting *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968)). Once a defendant is released from custody, “the subject matter of [that] assignment of error has ceased to exist and the issue is moot.” *Id.* at 475, 390 S.E.2d at 135. However,

“when the terms of the judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot[.]”

State v. Black, 197 N.C. App. 373, 375-76, 677 S.E.2d 199, 201 (2009) (quoting *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977)).

In the instant case, defendant already has served his four months of special probation. Furthermore, defendant has not argued to the Court any collateral adverse legal consequences that may result from the length of defendant's sentence. Therefore, we hold that the issue

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of whether defendant's active sentence of four months exceeded the statutory limit is moot.

We note that the trial court most likely erred in its sentencing of defendant with respect to North Carolina General Statutes, section 15A-1351(a). However, counsel for defendant should have petitioned for a writ of *supersedeas* in order to stay defendant's sentence until the matter could be resolved. *See* N.C. R. App. P. 23 (2007). Without such a writ and with defendant's sentence already having been executed, the issue presently is moot.

Defendant's second argument centers on the trial court's denial of his motion to suppress the evidence seized and the statements made on the day of arrest. Defendant contends that the trial court erred in denying his motion to suppress because (1) the trial court's finding of fact that the officers "detected a strong odor of marijuana in the air" is inherently incredible, and therefore, cannot constitute competent evidence; (2) the trial court's findings of fact do not support its conclusions of law that officers had both probable cause and exigent circumstances in order initially to enter and search the house; (3) the officers intimidated defendant, rendering his consent to a more thorough search of the house invalid; and (4) defendant was entitled to his *Miranda* rights before they were given and any statements made before officers advised him of his *Miranda* rights were, therefore, inadmissible.

[2] Defendant's first contention regarding the denial of his motion to suppress is that the officers' smelling of non-burning marijuana, most of which was in sealed containers, is inherently incredible, and therefore, cannot constitute competent evidence. Second, he argues that the officers had neither probable cause nor exigent circumstances to enter the house as found by the trial court. We disagree on both counts and will address these two points together.

Initially, we note that findings of fact and conclusions of law are reviewed using different standards.

In reviewing the trial court's order following a motion to suppress, we are bound by the trial court's findings of fact if such findings are supported by competent evidence in the record; but the conclusions of law are fully reviewable on appeal.

State v. Smith, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997) (citing *State v. Mahaley*, 332 N.C. 583, 592-93, 423 S.E.2d 58, 64 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995)).

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“An appellate court accords great deference to the trial court’s ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence.”

State v. Hernandez, 170 N.C. App. 299, 303-04, 612 S.E.2d 420, 423 (2005) (quoting *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994)).

“A warrantless search is lawful if probable cause exists to search and the exigencies of the situation make search without a warrant necessary.” *State v. Mills*, 104 N.C. App. 724, 730, 411 S.E.2d 193, 196 (1991) (citing *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979)).

Probable cause exists where the facts and circumstances within their [the officers’] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

State v. Downing, 169 N.C. App. 790, 795, 613 S.E.2d 35, 39 (2005) (quoting *State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886 (1999)) (internal quotation marks omitted). “Plain smell of drugs by an officer is evidence to conclude there is probable cause for a search.” *Id.* at 796, 613 S.E.2d at 39 (citing *State v. Trapper*, 48 N.C. App. 481, 484-85, 269 S.E.2d 680, 682, *appeal dismissed*, 301 N.C. 405, 273 S.E.2d 450 (1980), *cert. denied*, 451 U.S. 997, 68 L. Ed. 2d 856 (1981)).

[A]n exigent circumstance is found to exist in the “presence of an emergency or dangerous situation” and may include: a suspect’s fleeing or seeking to escape, possible destruction of a controlled substance, and “the degree of probable cause to believe the suspect committed the crime involved[.]”

State v. Frazier, 142 N.C. App. 361, 368-69, 542 S.E.2d 682, 688 (2001) (quoting *State v. Guevara*, 349 N.C. 243, 250, 506 S.E.2d 711, 716 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999); citing *Mills*, 104 N.C. App. at 731, 411 S.E.2d at 197; quoting *Allison*, 298 N.C. at 141, 257 S.E.2d at 421).

Officers also may conduct a protective sweep of a residence in order to ensure that their safety is not in jeopardy. *See, e.g., State v.*

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Taylor, 298 N.C. 405, 417, 259 S.E.2d 502, 509 (1979) (“The immediate need to ensure that no one remains in the dwelling preparing to fire a yet unfound weapon . . . constitutes an exigent circumstance which makes it reasonable for the officer to conduct a limited, warrantless, protective sweep of the dwelling.”). “Moreover, it is well settled that where the officers’ search is conducted during the course of ‘legitimate emergency activities’, they may seize evidence of a crime that is ‘in plain view.’” *State v. Phillips*, 151 N.C. App. 185, 192, 565 S.E.2d 697, 702 (2002).

In the instant case, the State does not argue that the officers had a warrant to search the house, nor does it contend that they had enough evidence for a warrant upon first arriving at the house. Our analysis, therefore, is constrained to whether the trial court’s findings of fact support its conclusion of law that the officers gained probable cause as they approached the house and that exigent circumstances existed to authorize entrance into and a protective sweep of the house without a warrant.

The officers had identified defendant’s house as matching the description provided by an informant, who stated that she had bought marijuana at that location. They were properly at defendant’s house to conduct a “knock and talk” after having received information from a confidential informant. *See State v. Weakley*, 176 N.C. App. 642, 648, 627 S.E.2d 315, 319 (2006) (“[O]fficers are entitled to go to a door to inquire about a matter; they are not trespassers under these circumstances.”) (quoting *State v. Prevette*, 43 N.C. App. 450, 455, 259 S.E.2d 595, 600 (1979)). Two City of Asheville police officers testified that they perceived a “strong odor of marijuana” when they first arrived at the residence. Three other officers observed that same smell, albeit after the door to the residence was already down. Defendant argues that these officers could not have smelled the marijuana located inside defendant’s residence, because it was not burning, the majority of the substance was in sealed containers, and what was loose was too small a quantity to be observable through the walls. However, the simple fact that the majority of the marijuana was in closed containers when the officers found it does not make the officers’ smelling of the drug “inherently incredible.”

Defendant points us to other jurisdictions that emphasize the importance of establishing an officer’s experience with drugs in order for his identification to be the basis of probable cause. However, this Court has noted that “in our opinion, a trained law enforcement officer need not swear to his ability to recognize an illegal substance in

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order for his observation to be deemed reliable[.]” *State v. Leonard*, 87 N.C. App. 448, 454, 361 S.E.2d 397, 400 (1987). Although *Leonard* dealt with an officer’s visual recognition of marijuana, we believe that an officer’s olfactory identification of the drug is equally reliable. Therefore, we hold that the officers’ testimony that they smelled marijuana outside defendant’s residence was competent evidence upon which the trial court could base its finding of fact that the officers “detected a strong odor of marijuana in the air.” Furthermore, that finding of fact sufficiently supported the trial court’s conclusion of law that the officers had probable cause to enter defendant’s house and conduct a protective sweep.

In addition to probable cause, the situation must have presented exigent circumstances in order to justify the officers’ entrance into defendant’s house. When Officers Crisp and Brown arrived at the residence and after they smelled marijuana, Officer Crisp heard a noise from the back of the house and saw defendant, whose upper torso was partially out a window. Although defendant states that he simply had responded to a call from his neighbor, Officer Crisp could reasonably believe that defendant was attempting to flee the scene. The officers also stated that they were concerned about possible destruction of evidence, due to the smell of marijuana and defendant’s possible attempted flight. These facts sufficiently support a conclusion that exigent circumstances existed at the time the officers gained entrance into defendant’s house. We hold, therefore, that both probable cause and exigent circumstances existed when officers entered defendant’s residence and conducted a protective sweep. Because the officers legally entered defendant’s house and saw the evidence seized in plain view during their protective sweep, the trial court did not err in admitting that evidence.

[3] The third part of defendant’s second argument—that the trial court erred in denying his motion to suppress—is that, based on the officers’ intimidation of defendant, defendant’s consent to the officers’ search was involuntary. We disagree.

Consent “has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given.” *Smith*, 346 N.C. at 798, 488 S.E.2d at 213 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854 (1973)). “The only requirement for a valid consent search is the voluntary consent given by a party who had reasonably apparent authority to grant or withhold such consent.” *State v. Houston*, 169 N.C.

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App. 367, 371, 610 S.E.2d 777, 780 (2005) (citing N.C. Gen. Stat. §§ 15A-221-222 (2003)). “Neither our state law nor federal law requires that any specific warning be provided to the party whose property is to be searched prior to obtaining consent for the consent to be valid.” *Id.* (citing *Schneckloth*, 412 U.S. at 234, 36 L. Ed. 2d at 867; *State v. Vestal*, 278 N.C. 561, 579, 180 S.E.2d 755, 767 (1971), *cert. denied*, 414 U.S. 874, 38 L. Ed. 2d 114 (1973)). “The mere fact that a person is in custody does not mean he cannot voluntarily consent to a search.” *State v. Schiffer*, 132 N.C. App. 22, 29, 510 S.E.2d 165, 169 (1999) (citing *State v. Powell*, 297 N.C. 419, 426, 255 S.E.2d 154, 158 (1979)). “In determining whether consent was given voluntarily this Court must look at the totality of the circumstances.” *Houston*, 169 N.C. App. at 371, 610 S.E.2d at 781 (citing *Schneckloth*, 412 U.S. at 226, 36 L. Ed. 2d at 862; *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994)).

In the case *sub judice*, Officer Crisp initially aimed his gun at defendant when he perceived that defendant was attempting to flee the premises. However, he lowered it promptly. Though the officers kicked down the door as they entered defendant’s house, they did not place him in handcuffs immediately. Rather, defendant sat in his own living room and conversed freely with various officers. One officer even escorted him to his neighbor’s house in order to find someone to care for his child. Two officers asked defendant’s permission to search the house after they had conducted their initial protective sweep. Defendant consented. Although these facts are not completely one-sided as to the issue of voluntariness, we hold that the evidence is sufficient to support the trial court’s findings of fact and its determination that defendant’s consent was voluntary.

[4] As the final portion of defendant’s second argument regarding the trial court’s denial of his motion to suppress, defendant contends that his statements should not have been found admissible because they were given prior to his being advised of his *Miranda* rights. We disagree.

“ ‘It is well established that *Miranda* warnings are required only when a [criminal] defendant is subjected to custodial interrogation.’ ” *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003) (quoting *State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253, *disc. rev. denied*, 354 N.C. 578, 559 S.E.2d 548 (2001)). “[T]he term ‘interrogation’ under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the

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police should know are reasonably likely to elicit an incriminating response from the suspect.” *Id.* at 114-15, 584 S.E.2d at 835 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980)). “This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation.” *Rhode Island*, 446 U.S. at 299, 64 L. Ed. 2d at 307. “ ‘Spontaneous statements made by an individual while in custody are admissible despite the absence of *Miranda* warnings.’ ” *Frazier*, 142 N.C. App. at 369, 542 S.E.2d 682, 688 (quoting *State v. Lipford*, 81 N.C. App. 464, 468, 344 S.E.2d 307, 310 (1986)).

In the instant case, the State does not contend that defendant was not in custody. The issue, therefore, is whether the police interrogated defendant prior to advising him of his *Miranda* rights, in violation of the Fifth Amendment.

Defendant’s statements concerning the drugs in his possession and the length of time that he had been engaged in selling drugs occurred at various points throughout 10 January 2008. The first was after Officer Crisp had lowered his weapon in the backyard while defendant was at the back window. Officer Crisp asked defendant why he was hanging out of the window, and defendant responded, “Man, I’ve got some weed.” The officer asked, “Is that the only reason you’re hanging out of the window?” Defendant stated, “Yeah, that’s the only reason. I have a lot. It’s right here beside me. Come and get it.” Although defendant was speaking in response to the officer’s questions, he was not responding to the questions asked. Officer Crisp’s question regarding defendant’s position at the window likely was intended to ascertain the circumstances with which he was dealing, rather than to elicit an incriminating answer from defendant. Furthermore, defendant offered additional unsolicited statements to Officer Maltby when he entered the house later. Defendant said that he had been selling marijuana for years and that he knew it was about time to get caught. Defendant stated that he does not deal with crack cocaine or rob people and that he only sells marijuana in order to feed his children. Officer Maltby did not ask any questions to elicit such information. These facts and testimony that the trial court heard were competent evidence on which to base a finding of fact and conclusion of law that defendant’s comments were not solicited and were not products of interrogation by the police. We hold, therefore, that the trial court properly denied defendant’s motion to suppress and admitted defendant’s voluntary statements.

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[5] For defendant's third argument—that the trial court erred in denying his motion to suppress because defendant had not given valid consent to the search and the officers had neither probable cause nor a search warrant—he directs the Court to the contents of his second argument. We, similarly, refer to our analysis of defendant's second argument to address his third contention. We hold that the trial court did not err when it denied defendant's motion to suppress, because defendant's consent was valid and, in the absence of a warrant, the officers had probable cause and exigent circumstances.

We hold that the issue of whether the length of defendant's active sentence violated North Carolina General Statutes, section 15A-1351(a) is moot. We further hold that the trial court did not err in denying defendant's motion to suppress. Accordingly, we affirm.

Affirmed.

Judge McGEE concurs.

Judge STEELMAN concurs in a separate opinion.

STEELMAN, Judge concurring.

I concur in the majority opinion, but write separately to emphasize the following:

I. Special Probation

It is clear that the trial court erred in imposing a term of special probation of four months in conjunction with a suspended sentence of six to eight months. N.C. Gen. Stat. § 15A-1351(a) provides that: “the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense” N.C. Gen. Stat. § 15A-1351(a) (2007). Thus, the maximum period of special probation that could have been imposed by the trial court was two months. The trial court further erred in the appellate entries in this case by denying release of defendant pending appeal. N.C. Gen. Stat. § 15A-1451(a) expressly provides: “When a defendant has given notice of appeal: . . . (4) Probation or special probation is stayed.” N.C. Gen. Stat. § 15A-1451(a)(4) (2007). Thus, by statute, the four-month term of special probation was automatically stayed when defendant gave notice of appeal. N.C. Gen. Stat. § 15A-1451(a)(4).

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While I seriously question the rationale of the cases holding that the above-cited errors are moot, I acknowledge that this Court is bound by those decisions. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

STATE OF NORTH CAROLINA v. LUCIANO DIAZ TELLEZ

No. COA09-338

(Filed 3 November 2009)

1. Appeal and Error— preservation of issues—limiting instruction—no objection

An appeal from a limiting instruction was not considered where defendant failed to object to the instruction when given prior to the introduction of the contested evidence, did not object to the instruction at the close of the evidence on the theory now presented, and neither assigned nor argued plain error.

2. Homicide— second-degree murder—drunken driving—malice—evidence sufficient

The State's evidence of defendant's convictions for reckless driving, alcohol consumption both before and while operating a motor vehicle, prior impaired driving, and driving while license revoked, as well as flight and elusive behavior after the collision, constituted substantial evidence of malice based upon depravity of mind sufficient to withstand a motion to dismiss a second-degree murder prosecution.

3. Evidence— hearsay—trooper's account of witness's statements—admissible—corroboration

In a second-degree murder prosecution arising from an auto collision, a Highway Patrol Trooper's testimony relating a passenger's statements about defendant (the driver) being drunk was properly admitted for corroboration because it strengthened the passenger's testimony. Furthermore, defendant could not demonstrate prejudice.

4. Appeal and Error— preservation of issues—closing argument—general objection

Defendant's general objection to the State's closing argument in a second-degree murder prosecution did not preserve for

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appellate review an issue involving due process or other constitutional considerations.

Appeal by defendant from judgments entered 22 August 2008 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 16 September 2009.

Attorney General Roy A. Cooper, III, by Special Attorney General Hal Askins and Assistant Attorney General Jess D. MeKeel, for the State.

Sofie W. Hosford, for defendant-appellant.

JACKSON, Judge.

Luciano Diaz Tellez (“defendant”) appeals from a conviction of two counts of second-degree murder and one count of felonious hit-and-run. For the reasons set forth below, we hold no error.

On 4 March 2007, at approximately 1:00 p.m., defendant arrived at a party in Coats, North Carolina where LuJayne Childers (“Childers”) and Ramon Castro (“Castro”) were already present. Defendant consumed approximately four beers during the party. Childers, who consumed three beers during the party, observed defendant drinking but did not spend significant time with him and did not know how much alcohol defendant had consumed. Shortly before dark, Childers, Castro, and defendant left the party. Defendant drove Castro’s car; Castro sat in the front passenger seat, and Childers sat in the rear passenger seat. At the time, Childers did not believe that defendant was intoxicated.

At approximately 5:00 p.m., Dwane Braswell (“Mr. Braswell”) left his house in Clayton, North Carolina with his nine-year-old son Jerry Braswell (“Jerry”) to pick up his weekly paycheck in Fuquay-Varina, North Carolina. Mr. Braswell hauled logs for a living with his eighteen-wheeler truck. At 6:18 p.m., Mr. Braswell called his wife Candy Braswell (“Ms. Braswell”) on a two-way radio and offered to bring dinner home.

Thereafter, Staley Ogburn (“Ogburn”) observed a large truck—a tractor without a trailer attached—approach the intersection of Plain View Church Road traveling eastbound on Highway 210 at approximately fifty-five miles per hour, which was the speed limit for that portion of the highway. Ogburn had stopped at the intersection to wait for the truck to pass so that he could turn right onto Highway 210.

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Meanwhile, defendant approached the intersection of Plain View Church Road and Highway 210. Defendant slowed down the car, but did not stop at the stop sign. Defendant drove around Ogburn's car and drove into the intersection at approximately twenty or twenty-five miles per hour. Childers yelled, "the truck," and Castro yelled, "the trucka," but defendant drove into the truck's path and collided with the truck. The truck rolled several times and caught on fire.

Childers did not see defendant after the collision, but he noticed that the driver's side door of the car was open. Ogburn saw two people, who appeared to be unharmed, sitting in the back seat of the car that hit the truck; Ogburn saw no one in the driver's seat.

Emergency Medical Services ("EMS") was dispatched at 6:46 p.m. and arrived on the scene at 6:53 p.m. Paramedics were unable to help the truck's occupants due to the intensity of the flames and were forced to wait for the fire department to arrive. Paramedics discovered the bodies of an adult male driver and a young male child, both burned beyond recognition. At approximately 9:35 p.m., Trooper Derek L. Mobley ("Trooper Mobley") informed Ms. Braswell that her husband and son had been killed in a car crash. Dr. Samuel Simmons ("Dr. Simmons"), an expert in forensic pathology, later testified that Mr. Braswell died of smoke and soot inhalation and thermal injury while Jerry died from smoke and soot inhalation, thermal injury, and blunt force cerebral injuries.

Trooper R. Brian Maynard ("Trooper Maynard") was the first trooper on the scene. He observed that the driver's side door of the car was ajar and that there were three beer cans inside the car—one in the driver's side door and two on the driver's side floorboard. One of the beer cans was open. Trooper Maynard also noticed a strong smell of alcohol coming from the inside of the car. Trooper Maynard took a written statement from Childers. Childers advised Trooper Maynard that she did not know where defendant was after the collision and that defendant "was drunk and left. He was drunk and ran, got scared." Officers were unable to locate defendant that night.

On the morning of 5 March 2007, Sergeant Joe A. Starling ("Sergeant Starling") observed a person matching defendant's description at a mobile home where officers believed defendant was residing. As Sergeant Starling pulled his car up to the home, defendant, who was drinking a beer at the time, "looked directly at" and "made eye contact" with Sergeant Starling and "turned and ran directly 180 degrees from [Sergeant Starling] towards the wood line."

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Sergeant Starling chased defendant and “hollered at him to stop.” Defendant stopped after Sergeant Starling caught up to and placed his hands on defendant. Sergeant Starling then placed defendant under arrest. Trooper Mobley arrived minutes later and observed that defendant’s clothes were damp, that he had a slight odor of alcohol about his person, and that he had scratches on his arms and face.

On the morning of 6 March 2007, police interviewed defendant with the assistance of Lea Granados, a Spanish interpreter certified by the Administrative Office of the Courts. Defendant admitted that he was driving the car at the time of the collision. Defendant stated that he did not see the truck when he pulled onto Highway 210 and that he tried to speed up upon realizing the truck was about to hit him. Defendant said he ran away after the collision because he was on probation. He also stated that he spent the night in the woods near his house. Defendant explained that he was “just having a beer” at the time Sergeant Starling encountered him at his residence.

Defendant admitted that he did not have and had never had a North Carolina driver’s license, and that his privilege to obtain one had been revoked. He further admitted that he had been arrested twice for driving while impaired. Specifically, defendant had been convicted of driving while impaired on 28 August 2002 stemming from driving with a 0.12 blood-alcohol concentration (“BAC”) on 15 May 2002. On 4 November 2005, defendant pleaded guilty and was placed on supervised probation for driving while license revoked and driving while impaired stemming from an incident on 29 April 2005 when, with a 0.21 BAC, he drove into two parked cars, forcing one of them into a residential building.

On 9 April 2007, a grand jury returned true bills of indictment against defendant for two counts of second degree murder and one count of felonious hit-and-run. At the 18 August 2008 Criminal Session of Johnston County Superior Court, defendant’s case was called for trial. On 22 August 2008, a jury found defendant guilty as charged, and the trial court sentenced defendant as a prior record level II offender to consecutive sentences of imprisonment of 189 to 236 months, 189 to 236 months, and seven to nine months, respectively, for the convictions. Defendant appeals.

[1] On appeal, defendant first argues that the trial court improperly instructed the jury with respect to evidence of his prior impaired driving and driving while license revoked convictions and that the court effectively instructed the jury that the State had proven the element

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of malice for second-degree murder. Defendant, however, has failed to preserve this argument for appellate review.

The North Carolina Rules of Appellate Procedure, Rule 10(b)(2) provides that

[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection

N.C. R. App. P. 10(b)(2) (2007). It is well-established that “where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts.” *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (internal citations and quotation marks omitted). *See also State v. Lopez*, 188 N.C. App. 553, 557, 655 S.E.2d 895, 898 (2008) (noting the defendant’s impermissible attempt at an “equine swap”). But, the North Carolina Rules of Appellate Procedure also provide that

[i]n criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(c)(4) (2007). *See also In re. W.R.*, 363 N.C. 244, 247 675 S.E.2d 342, 344 (2009) (noting that “plain error review is limited to errors in a trial court’s jury instructions or a trial court’s rulings on admissibility of evidence”) (quoting *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230-31 (2000)).

In the case *sub judice*, the trial court, prosecutor, and defense counsel engaged in the following colloquy with respect to giving pattern jury instruction, number 104.15 prior to the introduction of evidence of defendant’s previous convictions:

[THE COURT]: Well, here is what I proposed to tell the jury. Something along these lines: Members of the jury, you are about to hear evidence tending to show that on a previous occasion the defendant was charged with—I could say another crime. I could say the crimes of driving while impaired and driving while his driver’s license was revoked. I simply say as I indicated was charged with some other crime. Perhaps that’s the best way to

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deal with it right now. This evidence is being received solely for the purpose of showing malice as that term will be defined for you at a later time. If you believe this evidence, you may consider it, but only for the limited purpose for which it is being received.

....

[THE COURT]: What says the defendant?

[DEFENSE COUNSEL]: The defendant is satisfied with that instruction, Your Honor.

During the trial, and without objection, the trial court instructed the jury:

[A]t this time I expect that you are about to hear evidence tending to show that on some previous occasion the defendant was charged with some other crime. I charge that this evidence is being received solely for the purpose of showing malice as that term will be defined for you at some later time during this trial. If you believe this evidence, you may consider it, but only for the limited purpose for which it is being received.

Thus, the limiting instruction which defendant now contests on appeal was provided in substance and virtually verbatim to the jury, without objection, at trial.

Later, at the close of all the evidence, the trial court again instructed the jury, in relevant part, as follows:

[E]vidence has been received tending to show that on two occasions prior to the date of these alleged crimes, the defendant was convicted of driving while impaired and that on two other prior occasions he was convicted of driving with a revoked license. This evidence was received solely for the purpose of showing malice. If you believe this evidence, you may consider it, but only for this limited purpose for which it was received.

During the charge conference, the trial court, prosecutor, and defense counsel discussed the wording of this instruction at length. The court indicated its intention to include instruction, number 104.15 after the element of malice in pattern jury instruction, number 206.32 for second-degree murder. Defense counsel objected on the grounds that

along the way the jury needs to know that they can't use those prior conviction[s] as evidence that he was driving while

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impaired. And by taking it away from where you were going to put it and putting it into number five [of pattern jury instruction, number 206.32], what you're saying is this is what it's for, don't use it for anything else. Whereas before, it draws more attention of don't use it for guilt for any other purpose. I think it takes away something. Although it does make it very clear that it's being used for malice, I think it takes away from the instruction that it can be used for something else.

In other words, defendant objected to the limiting instruction on the grounds that it was not sufficiently limiting, not on the grounds—now advanced on appeal—that the “instruction effectively removed the State’s burden of proving the critical element of malice.”

Because defendant did not object to the instruction when given prior to the introduction of contested evidence, and because he did not object to the instruction given at the close of the evidence on the theory now presented, defendant was required to demonstrate that the alleged error amounts to plain error. *See* N.C. R. App. P. 10(c)(4) (2007). However, defendant neither assigned nor argued plain error, and thus, defendant has failed to preserve this issue for appellate review. *See State v. Rodriguez*, 192 N.C. App. 178, 187, 664 S.E.2d 654, 660 (2008). Since defendant failed to preserve the issue of the limiting instruction on appeal, we need not address it. *See Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008) (“[A] party’s failure to properly preserve an issue for appellate review ordinarily justifies the appellate court’s refusal to consider the issue on appeal.”).

[2] Next, defendant contends that the trial court erred in denying his motion to dismiss the second-degree murder charges on the grounds that there was no evidence that defendant was impaired. We disagree.

In order to survive a motion to dismiss, the State must present substantial evidence “(1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense.” *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). “The term ‘substantial evidence’ . . . is interchangeable with ‘more than a scintilla of evidence.’” *State v. Faison*, 330 N.C. 347, 358, 411 S.E.2d 143, 149 (1991) (quoting *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982)). “‘If there is more than a scintilla of competent evidence to support allegations in the warrant or indictment, it is the court’s duty

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to submit the case to the jury.’ ” *State v. Everhardt*, 96 N.C. App. 1, 11, 384 S.E.2d 562, 568 (1989), *aff’d*, 326 N.C. 777, 392 S.E.2d 391 (1990) (quoting *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958)). The court must consider all of the evidence admitted, in the light most favorable to the State, giving the State the benefit of every reasonable inference. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000). But, “[t]he defendant’s evidence, unless favorable to the State, is not to be taken into consideration.” *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982); *State v. Miller*, 363 N.C. 96, 98-99, 678 S.E.2d 592, 594 (2009). “[S]o long as the evidence supports a reasonable inference of the defendant’s guilt, a motion to dismiss is properly denied even though the evidence also ‘permits a reasonable inference of the defendant’s innocence.’ ” *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (quoting *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 140 (2002)). Ultimately, it is the jury’s task to resolve contradictions and discrepancies in the evidence and make the final determination of defendant’s guilt. *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

Defendant was convicted of second-degree murder. Second-degree murder is defined as “an unlawful killing with malice, but without premeditation and deliberation.” *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991). “Intent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice.” *Id.* To prove malice with respect to operating a motor vehicle, “[i]t is necessary for the State to prove only that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind.” *State v. Locklear*, 159 N.C. App. 588, 592, 583 S.E.2d 726, 729 (2003), *disc. rev. denied*, 358 N.C. 157, 593 S.E.2d 394, *aff’d*, 359 N.C. 63, 602 S.E.2d 359 (2004) (per curiam).

In the case sub judice, defendant concedes that there was evidence that he was operating the vehicle and that he previously had been convicted of driving while impaired. Defendant’s sole contention is that there was not sufficient evidence that he was impaired while driving on 4 March 2007. By focusing on evidence of impairment, defendant attempts to direct this Court’s attention away from the paramount issue—whether defendant “dr[ove] in such a reckless manner as reflects knowledge that injury or death would likely result.” *Locklear*, 159 N.C. App. at 592, 583 S.E.2d at 729. *See also State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000) (holding

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that in order to prove second-degree murder the State only was required “to prove [] that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result” and “was not required to show that defendant had a conscious, direct purpose to do specific harm or damage, or had a specific intent to kill”).

The State’s evidence clearly established that (1) defendant consumed three beers over three hours immediately prior to operating a motor vehicle; (2) defendant began consuming a fourth beer while operating a motor vehicle; (3) defendant failed to stop at a stop sign; (4) defendant drove around Ogburn’s vehicle and pulled onto Highway 210 without noticing the truck; (5) defendant sped up upon realizing the truck was about to hit him; (6) defendant purportedly did not notice that the truck with which he had collided was engulfed in flames; (7) defendant fled the scene of the crash without checking on either the occupants of the truck or his friends inside the severely damaged car; (8) Childers told investigators that defendant was drunk or, at the very least, that defendant may have been drunk; and (9) defendant hid and slept in the woods and ran from police when apprehended. In ruling upon a motion to dismiss, evidence favoring the State is to be considered as a whole in determining its sufficiency. *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 652-53. It is clear that the evidence of defendant’s reckless operation of the motor vehicle at the time of the collision viewed in its totality is substantial. *See State v. Davis*, 197 N.C. App. 738, 743, 678 S.E.2d 385, 389 (2009) (holding that the State’s evidence that defendant had a 0.13 BAC; defendant “got into his truck and drove on a well-traveled highway”; defendant “ran over a sign and continued driving”; defendant “continued weaving side to side”; defendant “eventually ran off the road and, without braking or otherwise attempting to avoid a collision, crashed into [a] pickup truck” was sufficient to support a finding of malice).

Accordingly, we hold that the State’s evidence of defendant’s reckless driving, alcohol consumption both before and while operating a motor vehicle, prior impaired driving and driving while license revoked convictions, and flight and elusive behavior after the collision constitutes substantial evidence of malice based upon depravity of mind sufficient to withstand a motion to dismiss.

[3] Next, defendant argues that the trial court erred by overruling his objection to the introduction of Trooper Maynard’s testimony conveying certain statements made by Childers to Trooper Maynard at

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the scene of the crash that defendant “was drunk and left He was drunk and ran, got scared.” We disagree.

“The standard of review for this Court assessing evidentiary rulings is abuse of discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Cook*, 193 N.C. App. 179, 181, 666 S.E.2d 795, 797 (2008) (quoting *State v. Hagans*, 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006)). The abuse of discretion standard applies to decisions by a trial court that a statement is admissible for corroboration. *See State v. Lloyd*, 354 N.C. 76, 104, 552 S.E.2d 596, 617 (2001) (“A trial court has ‘wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes.’”) (quoting *State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 513 (1998)).

Hearsay—which is “generally inadmissible,” *State v. Glynn*, 178 N.C. App. 689, 696, 632 S.E.2d 551, 556 (2006)—“is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2007). “However, out-of-court statements offered for a purpose other than to prove the truth of the matter asserted are not hearsay” *Glynn*, 178 N.C. App. at 696, 632 S.E.2d at 556. Thus, evidence offered for corroboration and not as substantive evidence will not be excluded as hearsay. *See State v. Garcell*, 363 N.C. 10, 39, 678 S.E.2d 618, 636-37 (2009).

As this Court has explained,

[c]orroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. In order to be admissible as corroborative evidence, a witness’[] prior consistent statements merely must tend to add weight or credibility to the witness’s testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates. If the previous statements are generally consistent with the witness’ testimony, slight variations . . . affect [only] the credibility of the statement. A trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes.

State v. Bell, 159 N.C. App. 151, 155, 584 S.E.2d 298, 301 (2003), *cert. denied*, 358 N.C. 733, 601 S.E.2d 863 (2004) (first and second alter-

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ations added) (internal citations and quotation marks omitted); *see also State v. Burton*, 322 N.C. 447, 450, 368 S.E.2d 630, 632 (1988). Ultimately, “[t]he trial court is in the best position to determine whether the testimony of [one witness as to a prior statement of another witness] corroborate[s] the testimony of [the latter].” *Bell*, 159 N.C. App. at 156, 584 S.E.2d at 302. Only if the prior statement contradicts the trial testimony should the prior statement be excluded. *See, e.g., Burton*, 322 N.C. at 450-51, 368 S.E.2d at 632-33 (holding that the trial court erred by overruling defendant’s objection to the admissibility of a prior statement that the victim was “lying flat on his back when he was shot” because the prior statement contradicted the witness’s trial testimony that the victim was “on top of” another individual).

In the case *sub judice*, Childers acknowledged during cross-examination that she told the investigator hired by defense counsel “[s]omething to th[e] effect” that she was not “sure whether the defendant was drunk or just a bad driver,” adding, “[m]aybe he was an inexperienced driver. I didn’t know if he was intoxicated. I didn’t think he was.” Later, during Trooper Maynard’s testimony, the trial court gave the following limiting instruction to the jury:

[Y]ou are about to hear testimony from this witness, Trooper Maynard, which might tend to show that at an earlier time a previous witness in this case, Ms. LuJayne Childers, made a statement which may be consistent or may conflict with her testimony at this trial. I instruct you that you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made and that it’s consistent or does conflict with the testimony of Ms. Childers at this trial, then you may consider this, together with all other facts and circumstances, bearing upon her truthfulness, in deciding whether you will believe or disbelieve her testimony at this trial.

Trooper Maynard then testified that when he asked Childers at the scene of the crash where the driver had gone, Childers told him, “I don’t know. He was drunk and left. He was drunk and ran, got scared.”

The two statements relate to Childers’s opinion of defendant’s level of impairment at different times. Contrary to defendant’s contentions, the prosecutor was not offering Trooper Maynard’s statement to corroborate Childers’s statement concerning her opinion

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prior to the crash. Instead, the prosecutor offered Trooper Maynard's statement to corroborate Childers's testimony that she made "statements to investigators saying that she did not know whether the defendant was drunk or just a bad driver." Childers initially stated that she thought defendant may have been drunk, while Childers's statement to Trooper Maynard that defendant "was drunk" provided new information and "strengthen[ed] or add[ed] credibility to her previous statement that she admitted during testimony." *See Bell*, 159 N.C. App. at 155, 584 S.E.2d at 301.

As noted, *supra*, "[a] trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes." *Bell*, 159 N.C. App. at 155, 584 S.E.2d at 301. Here, it cannot be said that the trial court's decision was "manifestly unsupported by reason and . . . so arbitrary that it could not have been the result of a reasoned decision." *State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)), *cert. denied*, 552 U.S. 1319, 170 L. Ed. 2d 760 (2008). Further, defendant cannot demonstrate prejudice, particularly in light of the abundance of caution exercised by the trial court in giving an appropriate limiting instruction.

Accordingly, we hold that Trooper Maynard's testimony strengthened Childers's testimony, and thus, the trial court properly admitted Trooper Maynard's testimony regarding Childers's statement to him that defendant "was drunk and left . . . He was drunk and ran, got scared" for corroboration.

[4] Finally, defendant argues that he was denied due process of law when the trial court permitted the State to make purportedly improper statements to the jury during its closing argument. We disagree.

Defendant made only a general objection to the State's closing arguments, which the trial court overruled:

[PROSECUTOR]: . . . But if you think back to the defendant's statement that he gave to the officers, I think that is a critical piece of evidence, how much time the defendant stayed at the party because he's drinking the entire time.

[DEFENSE COUNSEL]: Objection.

[THE COURT]: Overruled.

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On appeal, defendant attempts to extrapolate from that general objection an argument of constitutional magnitude. Accordingly, to the extent that the instant issue involves due process or other constitutional considerations, defendant has failed to preserve the issue for appellate review. *See State v. Dean*, 196 N.C. App. 180, 188, 674 S.E.2d 453, 459-60 (2009) (“It is well settled that constitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal.” (internal citations and quotation marks omitted)); N.C. R. App. P. 10(b) (2007).

For the foregoing reasons, we hold no error.

No error.

Judges McGEE and STEELMAN concur.



DINAH BORYLA-LETT, INDIVIDUALLY AND AS ADM. OF THE ESTATE OF, AMANDA BORYLA A/K/A AMANDA HRASAR, AND JEFFREY LETT, PLAINTIFFS V. PSYCHIATRIC SOLUTIONS OF NORTH CAROLINA, INC., D/B/A HOLLY HILL HOSPITAL, JOHN T. CLAPACS, NORTH RALEIGH PSYCHIATRY, P.A., AND SCOTT JACKSON, P.A., DEFENDANTS

No. COA08-1357

(Filed 3 November 2009)

1. Immunity— mental health admissions—summary judgment

Qualified immunity is sufficient to grant summary judgment for defendant, and the qualified immunity afforded by N.C.G.S. § 122C-210.1 applies to all of the defendants in this medical malpractice action arising from decedent not being admitted to a mental health hospital and subsequently committing suicide.

2. Immunity— mental health admissions—necessity of gross or intentional negligence

The holding in *Snyder v. Learning Servs. Corp.*, 187 N.C. App. 480, that a plaintiff must allege gross or intentional negligence to overcome the immunity of N.C.G.S. § 122C-210.1 once it attaches, is neither dicta nor erroneous.

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3. Immunity— mental health admissions—standards required—statutory immunity

In a case involving a decedent who committed suicide after not being admitted to a mental health facility, the qualified immunity available under N.C.G.S. § 122C-210.1 attaches if defendants followed accepted professional judgment, practice, and standards. Plaintiffs did not argue that defendants North Raleigh Psychiatry and Dr. Clapacs violated those standards.

4. Immunity— mental health admissions—use of information—drug test

In a case involving a decedent who committed suicide after not being admitted to a mental health facility, defendants Jackson and Holly Hill did not lose immunity under N.C.G.S. § 122C-210.1 by violating accepted professional judgment, practice, and standards.

5. Immunity— mental health admissions—needs assessment coordinator—professional judgment

The immunity provided by N.C.G.S. § 122C-210.1 applied in the case of a decedent who committed suicide after not being admitted to a mental hospital where, despite evidence to the contrary, the determinations of the needs assessment coordinator were the result of his professional judgment and did not represent a substantial departure from accepted professional judgment.

6. Immunity— mental health admissions—failure to page therapist

There was no failure to exercise professional judgment and thus no loss of qualified statutory immunity by not admitting a patient to a mental hospital where the patient's therapist was not paged at 2:15 a.m.

7. Immunity— mental health admissions—failure to obtain second signature

In a case involving a decedent who committed suicide after not being admitted to a mental health facility, the attachment of qualified immunity pursuant to N.C.G.S. § 122C-210.1 was not prevented by the failure to obtain a second employee's signature on the evaluation sheet.

Appeal by plaintiffs from orders entered 4 April 2008 and 27 May 2008 by Judges Donald W. Stephens and Orlando Hudson, respec-

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tively, in Wake County Superior Court. Heard in the Court of Appeals 7 April 2009.

Martin A. Rosenberg, for plaintiffs-appellants.

Crawford & Crawford, LLP, by Renee B. Crawford, Robert O. Crawford, III, and Heather J. Williams, for John T. Clapacs and North Raleigh Psychiatry, P.A., defendants-appellees.

Teague, Campbell, Dennis & Gorham, L.L.P., by J. Matthew Little and Kathryn Deiter-Maradei, for defendants-appellants.

JACKSON, Judge.

Dinah Boryla-Lett (“Boryla-Lett”) and Jeffrey Lett (“Lett”) (collectively, “plaintiffs”), both in their own capacities and on behalf of the estate of Amanda Boryla a/k/a Amanda Hrasar (“Amanda”), appeal the orders dated 4 April 2008 and 27 May 2008 granting summary judgment in favor of John T. Clapacs, M.D. (“Dr. Clapacs”); North Raleigh Psychiatry, P.A. (“North Raleigh”); Psychiatric Solutions of North Carolina, Inc. d/b/a Holly Hill Hospital (“Holly Hill”); and Scott Jackson (“Jackson”) (collectively, “defendants”). For the reasons set forth below, we affirm.

On 16 November 2005, at approximately 1:15 a.m., plaintiffs brought their daughter, Amanda, age twenty, to Holly Hill for admission. Holly Hill is a hospital specializing in providing mental health treatment, including patient commitment. Boryla-Lett testified in her deposition that Amanda was planning to commit herself voluntarily when she arrived at Holly Hill with her parents, but then she changed her mind. Plaintiffs expressed their concerns for Amanda’s safety and health to Jackson, who was working for Holly Hill at the time performing intake evaluations. They also told him that she had taken a “handful of pills” in the waiting room.

Jackson took Amanda into a private room to evaluate her. Jackson reviewed Amanda’s medical record, but he did not thoroughly examine it. Jackson did not perform a drug test on Amanda, nor did he interview her parents. Jackson examined Amanda for approximately thirty minutes. Amanda was described as calm, alert, and sad, but did not appear to be under the influence of drugs or alcohol. Amanda denied suicidal thoughts or plans. Jackson determined that Amanda did not require involuntary commitment to Holly Hill. Jackson requested permission to share Amanda’s medical information with her parents and suggested to Amanda that she voluntarily

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commit herself. Amanda declined both suggestions. Jackson signed the evaluation himself, but, in violation of Holly Hill's intake and assessment procedures, he did not obtain a second employee's signature. Jackson then called the on-call psychiatrist, Dr. Clapacs, for a second opinion. Based upon the information provided by Jackson, Dr. Clapacs agreed that Amanda was not a candidate for involuntary commitment.

Sometime after 2:15 a.m., Jackson told plaintiffs that Amanda was not a candidate for involuntary commitment, that she had declined voluntary commitment, and that she was to be sent home. Amanda's parents became upset with Jackson and with Amanda, and left Amanda at Holly Hill. Plaintiffs testified that Amanda told them that she wanted to get her own ride home with a friend. Jackson testified that plaintiffs "became upset and . . . left" the hospital, telling Amanda that she was not to return home.

Amanda tried unsuccessfully to get a ride home. At approximately 7:30 a.m., either Jackson or Holly Hill paid for a taxi service to take Amanda home. Amanda returned to an empty house and slept.

The next day, 17 November 2005, after talking with her family and spending time "with friends,"¹ Amanda locked herself in the bathroom at her home and died of a heroin overdose.

On 19 April 2007, plaintiffs filed a medical malpractice complaint. On 31 March 2008, Dr. Clapacs and North Raleigh filed a motion for summary judgment, and on 4 April 2008, the trial court granted their motion. On 14 April 2008, Jackson and Holly Hill moved for summary judgment, which the trial court granted on 27 May 2008. Plaintiffs appeal.

[1] Plaintiffs contend that the trial court erred in finding no issue of material fact and granting defendants' motions for summary judgment. We disagree.

As this Court recently explained,

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a mat-

1. During the time period when Amanda told her parents that she was out with friends, she ate at a restaurant at one point and was videotaped purchasing heroin at another.

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ter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.

A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.

Wilkins v. Safran, 185 N.C. App. 668, 671, 649 S.E.2d 658, 661 (2007) (quoting *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (internal quotation marks omitted), *aff'd*, 358 N.C. 131, 591 S.E.2d 521 (2004)).

We review a grant of summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citing *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006)). All evidence must be viewed in the light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

North Carolina General Statutes, section 122C-210.1 provides:

No facility or any of its officials, staff, or employees, or any physician or other individual who is responsible for the custody, examination, management, supervision, treatment, or release of a client and who follows accepted professional judgment, practice, and standards is civilly liable, personally or otherwise, for actions arising from these responsibilities or for actions of the client. This immunity is in addition to any other legal immunity from liability to which these facilities or individuals may be entitled and applies to actions performed in connection with, or arising out of, the admission or commitment of any individual pursuant to this Article.

N.C. Gen. Stat. § 122C-210.1 (2007). Qualified immunity, if applicable, is sufficient to grant a defendant's motion for summary judgment. *See Bio-Medical Application of North Carolina, Inc. v. N.C. Dep't of Health & Human Servs.*, 179 N.C. App. 483, 487-88, 634 S.E.2d 572, 576 (2006); *see generally Snyder v. Learning Servs. Corp.*, 187 N.C. App. 480, 653 S.E.2d 548 (2007). We hold that the qualified immunity afforded by North Carolina General Statutes, section 122C-210.1

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applies to all defendants *sub judice* and, therefore, we affirm the trial court's grant of summary judgment in favor of defendants.

[2] Under North Carolina law, '[c]laims based on ordinary negligence do not overcome . . . statutory immunity' pursuant to Section 122C-210.1; a plaintiff must allege gross or intentional negligence. *Cantrell v. United States*, 735 F. Supp. 670, 673 (E.D.N.C. 1988); *see also Pangburn v. Saad*, 73 N.C. App. 336, 347, 326 S.E.2d 365, 372 (1985) ('We therefore conclude that [North Carolina General Statutes, section] 122-24 [the precursor to North Carolina General Statutes, section 122C-210.1] was intended to create a qualified immunity for those state employees it protects, extending only to their ordinary negligent acts. It does not, however, protect a tortfeasor from personal liability for gross negligence and intentional torts.'). Nevertheless, as found by this Court, N[orth Carolina General Statutes, section] 122C-210.1 offers only a qualified privilege, meaning that, 'so long as the requisite procedures were followed and the decision [on how to treat the patient] was an exercise of professional judgment, the defendants are not liable to the plaintiff for their actions.' *Alt v. Parker*, 112 N.C. App. 307, 314, 435 S.E.2d 773, 777 (1993), *cert. denied*, 335 N.C. 766, 442 S.E.2d 507 (1994).

Snyder, 187 N.C. App. at 484, 653 S.E.2d at 551. Plaintiffs argue in their brief that our holding in *Snyder* is "plainly incorrect and, moreover, dicta." We disagree.

This portion of *Snyder* is not dicta because it is essential to the holding of the case. The question presented in *Snyder* was whether the defendants were entitled to immunity, which would have provided them a substantial right upon which they could base an appeal from an interlocutory order. *Snyder*, 187 N.C. App. at 483, 653 S.E.2d at 550. Moreover, we cannot agree that the legal analysis set forth in *Snyder* is erroneous. By reading the remainder of the quotation set forth *supra*, one can see that gross negligence must be alleged to overcome the statutory immunity once it attaches, but that this immunity does not attach until a defendant shows that he or she followed the "requisite procedures [and that] the decision [as to how to treat the patient] was an exercise of professional judgment." *Snyder*, 187 N.C. App. at 484, 653 S.E.2d at 551.

The distinction between negligence and gross negligence is not merely a question of degree of inadvertence or carelessness but one of reckless disregard. *See Yancey v. Lea*, 354 N.C. 48, 53, 550 S.E.2d

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155, 158 (2001). The difference is qualitative: “inadvertence” compared to “intentional wrongdoing or deliberate misconduct affecting the safety of others.” *Id.* (citing *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971)).

An act or conduct rises to the level of gross negligence when the act is done purposely and with knowledge that such act is a breach of duty to others, *i.e.*, a conscious disregard of the safety of others. An act or conduct moves beyond the realm of negligence when the injury or damage itself is intentional.

Id. (citing *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971)).

[3] Plaintiffs do not allege in their complaint that defendants acted with gross negligence or willful misconduct. Therefore, defendants’ statutory immunity cannot be overcome by plaintiffs’ claim of ordinary negligence. *See Snyder*, 187 N.C. App. at 484, 653 S.E.2d at 551. If defendants “follow[ed] accepted professional judgment, practice, and standards,” then the qualified immunity defense available pursuant to North Carolina General Statutes, section 122C-210.1 attaches, and it will be a valid affirmative defense upon which a trial court properly may grant summary judgment. *See id.*, and *Wilkins*, 185 N.C. App. at 671, 649 S.E.2d at 661.

We have developed a variety of ways to analyze a breach of “acceptable professional judgment, practice, and standards.” In *Youngberg v. Romeo*, 457 U.S. 307, 73 L. Ed. 2d 28 (1982), the United States Supreme Court defined the appropriate standard for evaluating claims based upon the federal constitutional liberty interests retained by individuals committed to state mental institutions. *Youngberg*, 457 U.S. at 321-22, 73 L. Ed. 2d at 41. In *Alt v. Parker*, 112 N.C. App. 307, 435 S.E.2d 773 (1993), *cert. denied*, 335 N.C. 766, 442 S.E.2d 507 (1994), we adopted the *Youngberg* interpretation of “professional judgment” as an appropriate standard against which to measure section 122C-210.1 immunity claims. *Alt*, 112 N.C. App. at 314, 435 S.E.2d at 777 (explaining that “[t]he [Supreme] Court adopted the standard of review that had been postulated in a concurring opinion of the lower court: ‘the Constitution² only requires that the courts

2. We note that the relevant issue presented in *Alt* concerned the plaintiff’s claim for false imprisonment after being restrained by the hospital’s staff against the plaintiff’s will. *See Alt*, 112 N.C. App. at 313-18, 435 S.E.2d at 776-79. The restraint issue also implicated certain of the plaintiff’s liberty interests. *Id.* Notwithstanding, in *Alt*, we set forth our view that the United States Supreme Court’s reasoning in *Youngberg* comported with our reading of North Carolina General Statutes, section 122C-210.1. *Alt*,

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make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.’” (quoting *Youngberg*, 457 U.S. at 321, 73 L. Ed. 2d at 41)).

In *Alt*, because the “requisite procedures were followed and the decision [concerning] the plaintiff was an exercise of professional judgment,” immunity properly was granted. *Alt*, 112 N.C. App. at 314, 435 S.E.2d at 777. In the facts specific to that case, “the applicable procedures and regulations [came] from three sources, the General Statutes, the North Carolina Administrative Code and the official policies of the Hospital.” *Id.*

Courts are required only to “make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.” *Youngberg*, 457 U.S. at 321, 73 L. Ed. 2d at 41 (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980) (Seitz, J., concurring)). In this way, different opinions as to the proper standard of care or the proper medical action do not, *ipso facto*, defeat a claim of immunity pursuant to section 122C-210.1. Plaintiffs fail to make any argument in their brief that North Raleigh or Dr. Clapacs violated accepted professional judgment, failed to act within their professional judgment, or failed to follow accepted professional standards and procedures. Accordingly, we hold that the statutory immunity provided by North Carolina General Statutes, section 122C-210.1 provides an adequate basis for the trial court’s grant of summary judgment in favor of Dr. Clapacs and North Raleigh.

[4] Plaintiffs allege multiple ways in which Jackson and Holly Hill failed to follow accepted professional judgment, practice, and standards. They claim first that Jackson violated portions of the Mental Health, Development, Disabilities, and Substance Abuse Act of 1985 (“the Act”). See N.C. Gen. Stat. § 122C-211(a) (2007). Plaintiffs cite the Act as requiring that “information provided by family members regarding the individual’s need for treatment shall be reviewed in the evaluation” and that “the facility shall give to an individual who is denied admission a referral to another facility or facilities that may be able to provide the treatment needed by the client.” *Id.*

112 N.C. App. at 314, 458 S.E.2d at 777. Accordingly, we conduct our analysis of the qualified immunity granted by section 122C-210.1 in view of the “professional judgment” requirement set forth in *Youngberg*. See *Youngberg*, 457 U.S. at 321-22, 73 L. Ed. 2d at 41.

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Plaintiffs allege that Jackson violated the Act by not asking the parents questions and not referring Amanda to another hospital. However, the statute, as cited by plaintiffs, requires only that any information that is in fact gained is to be considered in the evaluation; it does not require the evaluator to affirmatively seek out such information. *See id.* Plaintiffs do not allege that information was gained and not used. The evidence shows that the only information presented to Jackson was the intake form filled out by Boryla-Lett, which he used in his evaluation of Amanda. Furthermore, plaintiffs' allegations do not suggest that Amanda was "denied admission." She was not. She was offered voluntary admission by Jackson, and she refused. Therefore, plaintiffs' argument is unavailing.

Plaintiffs further contend that Jackson did not perform a drug test on Amanda after allegedly being informed by Boryla-Lett that Amanda had taken a "handful of pills." There is no allegation that Jackson should have known the nature of these pills. Further, Jackson's performance comported with hospital policies against seeking a drug test when the patient denies drug use and no direct evidence of drug use is evident. During Jackson's examination of Amanda, she was calm and alert and did not appear to be using drugs or alcohol. In addition, Jackson interviewed Amanda for at least thirty minutes, and she remained in his presence until approximately 7:30 a.m., during which time he observed no effects suggesting current drug use. We hold that Jackson's decision not to administer a drug test was not a substantial departure from accepted professional judgment, practice, or standards and that, given his observation of Amanda's calm, lucid state during a period of several hours, it was not an arbitrary, unprofessional choice. *See Youngberg*, 457 U.S. at 321-22, 73 L. Ed. 2d at 41.

[5] Next, plaintiffs argue that the information Jackson obtained from plaintiffs in the waiting room was deficient and that Jackson's review of Amanda's record was insufficient. However, Jackson testified that he did review the medical record as thoroughly as his experience deemed necessary. He also testified that he read the intake form filled out by Boryla-Lett, and he determined that the information from the family was sufficient for his review. Notwithstanding plaintiffs' expert witness's testimony that Jackson should have made more use of information available from the family members and the medical records, we hold that Jackson's determinations were the result of his professional judgment and that they do not represent a substantial departure from accepted professional judgment. *See id.* *See also Alt*,

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112 N.C. App. at 314, 435 S.E.2d at 777 (“It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.”) (quoting *Youngberg*, 457 U.S. at 321, 73 L. Ed. 2d at 41).

[6] Plaintiffs further argue that Jackson should have contacted Amanda’s treating therapist at 2:15 in the morning. Had Jackson called the therapist’s office number, he would have received an automated message, saying that, if immediate attention was necessary, he should call Holly Hill. In fact, the message would have directed him to contact his own division within Holly Hill. Although he could have sought out the therapist’s pager number from Amanda, we hold that a failure to demand a pager number from a therapy patient for the purpose of contacting the therapist concerning a patient who seemed calm, alert, and not under the influence of any substances, did not represent a failure to exercise professional judgment. *See Youngberg*, 457 U.S. at 321-22, 73 L. Ed. 2d at 41.

[7] Finally, plaintiffs argue that Jackson did not obtain a second employee signature on his evaluation as required by Holly Hill policy. However, this failure to have a second employee sign the form resulted from inadvertence rather than a conscious professional decision.

At his deposition, Jackson testified in relevant part as follows:

Q On [Holly Hill Needs Assessment and Referral, Assessment Policy—Face-to-Face Procedure] Number 5, “After completion of the assessment, consultation will take place with another needs assessment coordinator, noted by a signature on the assessment form below the individual who conducted the assessment. This is to ensure every evaluation have at least two trained professionals reviewing the clinical data.” Is that what it says?

A Uh-huh (affirmative).

Q Did we do that in Amanda’s case?

A I remember talking the case over with Stephanie [Justice (“Justice”)] when I came back in to call Dr. Clapacs. She didn’t sign the form, but I remember discussing—but she didn’t—that—this doesn’t mean that the other person goes in and does another evaluation.

And, actually, that is less important than discussing the case with a psychiatrist because there’s usually not a whole—when I’ve had

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people use me or discuss a case with me, you know, I may come up with some idea or I may have a suggestion, but truthfully, they—they—the key piece is reviewing whatever you’ve found with the doctor of record.

....

Q Okay. Well, she certainly didn’t sign this form.

A No.

Nonetheless, we do not believe that the obligation to follow accepted professional judgment is obviated by every deviation from the letter of a hospital’s self-imposed rules.³ To hold otherwise would elevate form over substance. Nor does the requirement that one exercise professional judgment provide that a non-material deviation from hospital rules necessarily constitutes a violation of accepted procedure. That is not to say that a hospital’s rules are not a relevant factor in determining whether an action was in following professional judgment and standards. *See Alt*, 112 N.C. App. at 314, 435 S.E.2d at 777. However, such rule violations are only one factor to be considered, and are neither required for a revocation of immunity nor necessarily sufficient standing alone to abrogate immunity.

In the case *sub judice*, Holly Hill’s procedural rule at issue requires that

[u]pon completion of the assessment, a consultation will take place with another Needs Assessment Coordinator, noted by a signature on the assessment form below the individual who conducted the assessment. This is to ensure every evaluation have at least two trained professionals reviewing the clinical data.

3. We note that, in *Alt*, immunity was granted when the defendants apparently followed all applicable rules, statutes, and standards. *See Alt*, 112 N.C. App. at 314-18, 435 S.E.2d at 777-79. In contrast, we note that, in *Snyder*, immunity was denied when “the investigative report from the North Carolina Division of Facility Services (NCDFS), the licensing and investigative arm for mental health facilities in North Carolina, was submitted with its findings that [the defendant] had failed to adequately supervise Timothy Snyder.” *Snyder*, 187 N.C. App. at 484, 653 S.E.2d at 551-52. “NCDFS further concluded that Learning Services was guilty of a Type A violation, one that results in death or serious physical harm, fined Learning Services, and ordered the center to make immediate corrections.” *Snyder*, 187 N.C. App. at 484-85, 653 S.E.2d at 552. Because these cases represent the outer bounds between full observance of required conduct and severely deficient performance, we view both as instructive. The instant case falls between the two and therefore requires a fact-specific inquiry to determine whether defendant’s actions were sufficient for immunity to attach.

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During the time Amanda was present at Holly Hill on 16 November 2005, Jackson and Justice were the two Needs Assessment Coordinators on duty. The uncontroverted testimony of both Jackson and Justice demonstrates that Jackson consulted with Justice, as is required by the Holly Hill procedure. Justice explained that “[Jackson] went over the basic information [Amanda] gave him for the assessment and we just discussed the appropriateness of what kind of treatment she might . . . need.” She continued by noting that “[t]ypically, we do not see the patient directly. We can provide collateral. We come in—various counselor’s, whoever’s working usually runs the major ideas of what the assessment was about by whomever is sitting in there.”

We acknowledge that it is uncontroverted that Justice did not sign the intake evaluation to note the consultation. Although the stated purpose for the signature is to “ensure every evaluation have at least two trained professionals reviewing the clinical data,” Justice testified that she did not review any of Amanda’s clinical data, only verbal data provided by Jackson.

Notwithstanding, on the facts in the case *sub judice*, Jackson was a trained and experienced Needs Assessment Coordinator, and he was Amanda’s primary intake counselor. He personally observed her appearance and demeanor during his half-hour interview with her and over the course of several early-morning hours Amanda spent in Holly Hill’s waiting area. In view of his interactions with and observations of Amanda, his review of her intake materials, and the information volunteered by her parents, further informed by his training and experience, Jackson performed an adequate consultation with another Needs Assessment Coordinator, Justice. Justice, based upon her conversation with Jackson and informed by her independent training and experience, confirmed Jackson’s judgment. Jackson then consulted with Dr. Clapacs, who also confirmed Jackson’s judgment. Although Justice failed to sign her name as evidence of her endorsement of Jackson’s judgment, we cannot say this is a material deviation from the hospital’s rules regarding a face-to-face needs assessment. Amanda was an adult, who appeared lucid during the time she spent at Holly Hill, and she declined both her parents’ urging and Jackson’s offer to admit herself voluntarily into Holly Hill for treatment.

Accordingly, we hold that the failure to obtain a second employee’s signature on the evaluation sheet was not a sufficiently material departure from the hospital’s rules to demonstrate a failure

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to use and follow the requisite professional judgment, practice, and standards so as to prevent attachment of qualified immunity pursuant to North Carolina General Statutes, section 122C-210.1.

For the forgoing reasons, we hold that defendants are immune within the meaning of section 122C-210.1 of the North Carolina General Statutes, and we affirm the trial court's grant of summary judgment in defendants' favor.

Affirmed.

Judges HUNTER, Jr., Robert N. and ERVIN concur.

SHERRI B. BLAYLOCK, AS GUARDIAN AD LITEM FOR H.L., MINOR, AND B.L., MINOR,
PLAINTIFFS V. NORTH CAROLINA DEPARTMENT OF CORRECTION—DIVISION
OF COMMUNITY CORRECTIONS, DEFENDANT

No. COA09-65

(Filed 3 November 2009)

1. Appeal and Error— interlocutory order—immunity through public duty doctrine—immediately appealable

The defense of governmental immunity through the public duty doctrine affects a substantial right and is immediately appealable.

2. Immunity— public duty doctrine—probation officer's placement of sexual offender—special relationship—summary judgment

Defendant's motion for summary judgment based on the public duty doctrine was correctly denied by the Industrial Commission in an action arising from a probation officer's placement of a sexual offender in a home with children whom he eventually abused. The harm was not the direct result of the probation officer's actions, and there was a question as to whether a special relationship existed between the probation officer and the children.

Appeal by defendant from order entered 10 September 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 August 2009.

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Janet, Jenner & Suggs, LLC, by John C. Hensley, Jr., for plaintiffs-appellees.

Roy Cooper, Attorney General, by Amar Majmundar, Special Deputy Attorney General, and Tina Lloyd Hlabse, Assistant Attorney General, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals an order of the North Carolina Industrial Commission denying its Motion for Summary Judgment. We affirm the Commission's order.

In February 2003, Kim Hemphill ("Ms. Hemphill") was employed by defendant as a probation officer in McDowell County, North Carolina. As part of her duties, she was assigned to supervise James Oakes ("Mr. Oakes"), who was on probation for convictions of indecent exposure and two counts of simple assault. Mr. Oakes's problems extended beyond his involvement with the North Carolina court system; not only was he diagnosed as bi-polar and schizophrenic, but he had also been identified as a sexual offender in the mid-1990's by the staff at Foothills Mental Health. As a result, multiple McDowell County agencies were familiar with Mr. Oakes and were aware of his label as a sexual offender.

At a meeting with Mr. Oakes on 14 February 2003, Ms. Hemphill learned he was living in a motel with another probationer, which Ms. Hemphill's supervisor determined was an inappropriate living arrangement. In order to correct the situation, Ms. Hemphill began making phone calls to assist Mr. Oakes in finding suitable living arrangements. After unsuccessfully calling Mr. Oakes's mother and a homeless shelter, Mr. Oakes suggested that he might be able to stay with David Ledford ("Mr. Ledford") and Sherri Blaylock ("Ms. Blaylock"), a married couple related to Mr. Oakes through marriage. Ms. Hemphill contacted Ms. Blaylock at work to ask if Mr. Oakes could stay with her family. Ms. Blaylock indicated that she would have to speak with Mr. Ledford before she would allow Mr. Oakes to move into their home.

With this information, Ms. Hemphill drove to the home of Ms. Blaylock and Mr. Ledford ("Blaylock/Ledford home") to discuss the issue with Mr. Ledford. When she arrived at the home, Mr. Ledford was there with his four children, including H.L. and B.L. ("the minor children-plaintiffs"), and two other acquaintances. Ms. Hemphill informed Mr. Ledford of her conversation with Ms.

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Blaylock and indicated that it was all right with Ms. Blaylock for Mr. Oakes to stay at their home if it was all right with Mr. Ledford. Mr. Ledford agreed to the arrangement, and Ms. Hemphill left Mr. Oakes in his care. Before she left, Ms. Hemphill gave Mr. Ledford her business card and told him to give her a call if they had any problems. Shortly thereafter, on or about 16 February 2003, Mr. Oakes sexually assaulted the minor children-plaintiffs in their bedroom at the Blaylock/Ledford home.

Ms. Blaylock, on behalf of the minor children-plaintiffs, initiated this action before the North Carolina Industrial Commission on 30 December 2003 alleging that defendant's agent, Ms. Hemphill, failed to exercise reasonable care in placing Mr. Oakes in the Blaylock/Ledford home, as she knew or should have known he posed a substantial risk of harm to the minor children-plaintiffs. Defendant moved for summary judgment on 8 January 2007 on the grounds that the public duty doctrine applied as a bar to the minor children-plaintiffs' claim. The Deputy Commissioner granted defendant's motion on 12 December 2007, holding that the public duty doctrine applied absent any evidence of an exception. The minor children-plaintiffs appealed to the Full Commission on 27 December 2007. On 10 September 2008, the Full Commission reversed the Deputy Commissioner's order granting defendant's summary judgment motion. In doing so, the Full Commission held that the public duty doctrine does not apply to the present case, or, in the alternative, a genuine issue of material fact exists as to whether the present facts fit within the special relationship exception to the public duty doctrine. Defendant appeals.

The sole issue on appeal is whether defendant is shielded from liability by the public duty doctrine. For the reasons stated below, we conclude that there is a genuine issue of material fact as to whether, upon the evidence before the Commission considered in the light most favorable to the minor children-plaintiffs, their claim is barred by the public duty doctrine, as the facts presented establish the existence of a special relationship.

[1] As an initial matter, defendant's appeal is interlocutory. *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy"), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Generally, an interlocutory

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order is not immediately appealable to this Court. *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 403, 442 S.E.2d 75, 77, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994). However, where a substantial right is affected, a party may appeal immediately from an interlocutory order. N.C. Gen. Stat. § 1-277(a) (2007); *see id.* This Court has held that the defense of governmental immunity through the public duty doctrine affects a substantial right and is, therefore, immediately appealable. *Clark*, 114 N.C. App. at 403, 442 S.E.2d at 77. Accordingly, defendant's appeal is properly before this Court.

[2] "On appeal, an order [denying] summary judgment is reviewed *de novo*." *Tiber Holding Corp. v. DiLoreto*, 170 N.C. App. 662, 665, 613 S.E.2d 346, 349, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). Thus, in viewing the evidence in the light most favorable to the non-moving party, this Court must determine "whether the pleadings, interrogatory answers, affidavits or other materials contained a genuine question of material fact, and whether at least one party was entitled to a judgment as a matter of law." *Medley v. N.C. Dep't of Corr.*, 99 N.C. App. 296, 298, 393 S.E.2d 288, 289 (1990), *aff'd*, 330 N.C. 837, 412 S.E.2d 654 (1992); *accord Bruce-Terminex Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Summary judgment is proper where "there are no genuine issues of material fact, and the plaintiff fails to demonstrate one of the essential elements of the claim." *Parish v. Hill*, 350 N.C. 231, 236, 513 S.E.2d 547, 550 (citing *Lavelle v. Schultz*, 120 N.C. App. 857, 859, 463 S.E.2d 567, 569 (1995), *disc. rev. denied*, 342 N.C. 656, 467 S.E.2d 715 (1996); *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985)), *reh'g denied*, 350 N.C. 600, 537 S.E.2d 215 (1999).

The minor children-plaintiffs have based their claim against defendant in negligence. In a claim for negligence, there must exist a "legal duty owed by a defendant to a plaintiff." *Hedrick v. Rains*, 121 N.C. App. 466, 469, 466 S.E.2d 281, 283, *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996). However, when the public duty doctrine applies, the government entity, as the defendant, owes no *legal* duty to the plaintiff. *See Myers v. McGrady*, 360 N.C. 460, 463, 628 S.E.2d 761, 764 (2006). In essence, "[i]f the plaintiff alleges negligence by failure to carry out a recognized public duty, and the State does not owe a corresponding special duty of care to the plaintiff individually, then the plaintiff has failed to state a claim in negligence." *Id.* (citing *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 196, 499 S.E.2d 747, 749-50 (1998); *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 482, 495 S.E.2d 711, 716, *reh'g denied*, 502 S.E.2d 836, *cert. denied*, 525 U.S. 1016, 142

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L.E.2d 449 (1998)). Therefore, if the public duty doctrine applies, summary judgment in favor of the defendant is appropriate. *Id.*

The public duty doctrine was officially recognized in this State in *Braswell v. Braswell* as a shield from liability for a municipality for its law enforcement officials' failure to provide protection to individual citizens from the criminal acts of a third party. 330 N.C. 363, 370-71, 410 S.E.2d 897, 901 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992). "This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act." *Id.* In recognizing the general doctrine, our Supreme Court additionally acknowledged two exceptions to the public duty doctrine:

(1) where there is a special relationship between the injured party and the police, for example, a state's witness or informant who has aided law enforcement officers; and (2) when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered.

Braswell, 330 N.C. at 371, 410 S.E.2d at 902 (internal quotation marks omitted). Accordingly, if either exception applies, the public duty doctrine no longer operates as a shield against liability. *See id.*

In *Humphries v. North Carolina Department of Correction*, this Court extended the application of the public duty doctrine to probation officers for their failure to protect the public by appropriately supervising their probationers. 124 N.C. App. 545, 547, 479 S.E.2d 27, 28 (1996), *disc. review improvidently allowed*, 346 N.C. 269, 485 S.E.2d 293 (1997). In that case, Kenneth Miller ("Miller"), while on probation and under electronic house arrest, assaulted Tyrone Humphries and killed Stacey Humphries. *Humphries*, 124 N.C. App. at 546-47, 479 S.E.2d at 27-28. Miller's probation officer, aware of his violent nature, failed to contact his employer to confirm his employment status. *Humphries*, 124 N.C. App. at 546, 479 S.E.2d at 27. Additionally, the probation officer failed to take action when he discovered that Miller's electronic leg band had broken. *Humphries*, 124 N.C. App. at 546-47, 479 S.E.2d at 27. In a suit against the North Carolina Department of Correction, this Court reasoned that the probation officer's duty to supervise was a duty owed to the general public. *Humphries*, 124 N.C. App. at 548, 479 S.E.2d at 28. Therefore, the public duty doctrine barred any claims against the

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Department of Correction for the probation officer's failure to properly supervise Miller. *Id.*

The present case involves a probation officer who, while exercising her duties to supervise Mr. Oakes, facilitated his placement in the Blaylock/Ledford home. This alleged negligent act resulted in Mr. Oakes sexually assaulting the minor children-plaintiffs. It is apparent from these facts that Ms. Hemphill's actions constitute a "failure to [provide] police protection to specific individuals" from the criminal acts of a third party. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Therefore, based on this Court's ruling in *Humphries*, we hold that the public duty doctrine applies to the facts of this case.

The Full Commission below, in holding that the public duty doctrine was inapplicable to the present case, reasoned that "the affirmative actions of Defendant's agent and employee, Ms. Hemphill, directly resulted in the harm caused to the minor Plaintiffs." As such, it held that "[t]he facts of this case do not arise from Defendant's failure to make a discretionary allocation of agency resources" Though we agree with the Full Commission's statement of the law, we do not agree with its application to the present case.

This Court has never applied the public duty doctrine when a police officer's affirmative actions have directly caused harm to a plaintiff. *Moses v. Young*, 149 N.C. App. 613, 616, 561 S.E.2d 332, 334 ("An exhaustive review of the public duty doctrine as applied in North Carolina reveals no case in which the public duty doctrine has operated to shield a defendant from acts directly causing injury or death."), *disc. review denied*, 356 N.C. 165, 568 S.E.2d 199 (2002); *see also Smith v. Jackson Cty Bd. of Educ.*, 168 N.C. App. 452, 460, 608 S.E.2d 399, 406 (2005). In *Smith v. Jackson County Board of Education*, this Court evaluated the application of the public duty doctrine to the actions of a school resource officer. 168 N.C. App. at 459-60, 608 S.E.2d at 406. There, the plaintiff sued the defendant under N.C.G.S. § 99D-1 for "interference with civil rights." *Smith*, 168 N.C. App. at 460, 608 S.E.2d at 406. The Court reasoned that a claim under this statute "involve[d] intentional conduct." *Id.* Additionally, the facts alleged in support of this claim reflected affirmative conduct by the defendant's agent, the school resource officer, that directly resulted in the interference with the plaintiff's civil rights. *Id.* Accordingly, the public duty doctrine did not bar the claim. *Id.*

This Court's focus in finding the public duty doctrine inapplicable to the cases discussed above has hinged on the fact that, in those

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cases, the police officers' conduct *directly* caused harm, instead of merely being an *indirect* cause of the plaintiffs' injuries. *Moses*, 149 N.C. App. at 616, 561 S.E.2d at 334. The focus has not been, as the minor children-plaintiffs urge, on the distinction between the defendants' affirmative actions versus their failure to act. *Clark*, 114 N.C. App. at 404, 442 S.E.2d at 77 ("The breach of duty may be a negligent act or a negligent failure to act."); *see also Hobbs ex rel. Winner v. N. C. Dept. of Human Res.*, 135 N.C. App. 412, 417-19, 520 S.E.2d 595, 600-01 (1999) (holding that the affirmative actions of DSS in placing a sexually abused child in a foster home with other small children without properly warning the foster parents fell within the applicability of the public duty doctrine, however applying the special relationship and the special duty exceptions); *see also Stafford v. Barker*, 129 N.C. App. 576, 584, 502 S.E.2d 1, 6 (holding that the plaintiff's claim against a sheriff for his affirmative actions in negligently releasing a person who later shot and killed the plaintiff was barred by the public duty doctrine and neither of the exceptions applied), *disc. review denied*, 348 N.C. 695, 511 S.E.2d 650 (1998). This reasoning is in line with the stated purpose in applying the public duty doctrine to the actions of police officers: that "[t]his rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act" of another. *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901.

The present facts are distinguishable from the cases discussed above. Here, Ms. Hemphill's actions did not directly cause harm to the minor children-plaintiffs. Instead, her actions with regards to Mr. Oakes only indirectly resulted in his sexual assault of the minor children-plaintiffs. Accordingly, we depart from the Full Commission's conclusion and hold that the public duty doctrine applies to the present case.

However, our discussion does not end here. The public duty doctrine, as stated above, is subject to two exceptions, the special duty exception and the special relationship exception, and a plaintiff's claim will survive if he can establish the existence of either. *Watts v. N.C. Dep't of Env't and Natural Res.*, 362 N.C. 497, 498, 666 S.E.2d 752, 753 (2008). The minor children-plaintiffs did not argue before the Full Commission or before this Court that the special duty exception applies, and there is no evidence in the record that Ms. Hemphill made any specific promise of protection. *See Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. Therefore, we must only address the applicability of the special relationship exception.

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A special relationship exists when there are “representations or conduct by the police which cause the victim(s) to detrimentally rely on the police such that the risk of harm as the result of police negligence is something more than that to which the victim was already exposed.” *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 338, 511 S.E.2d 41, 44 (internal quotation marks omitted), *cert. denied*, 350 N.C. 851, 539 S.E.2d 13 (1999), *overruled on other grounds by Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000). This exception has generally been discussed with regards to relationships between an informant and a police officer or between inmates and the State. *Multiple Claimants v. N.C. Dep’t of Health and Human Services, Div. of Facility Services, Jails and Detention Services*, 361 N.C. 372, 379, 646 S.E.2d 356, 360 (2007); *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. However, this is not an exhaustive list, and in fact, this Court has applied the special relationship exception to other factual situations. *See Hobbs*, 135 N.C. App. at 419, 520 S.E.2d at 601.

In *Hobbs ex rel. Winner v. North Carolina Department of Human Resources*, Kemesha and Michael Hobbs (“the Hobbs family”) sued the Wake County Department of Social Services and various other agencies on behalf of their daughter for the negligent placement of a twelve-year-old boy in their foster home. 135 N.C. App. at 413-15, 520 S.E.2d at 598. As a result of this placement, the young boy sexually assaulted their daughter. *Hobbs*, 135 N.C. App. at 414, 520 S.E.2d at 598. The trial court granted defendants’ motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). *Hobbs*, 135 N.C. App. at 415, 520 S.E.2d at 598. In an appeal by the Hobbs family, this Court reasoned that the motion to dismiss was improperly granted because the facts alleged properly asserted a special relationship between the Hobbs family and the defendants. *Hobbs*, 135 N.C. App. at 419, 520 S.E.2d at 601. In reaching this conclusion, this Court looked to the direct contact and discussions between the defendants and the Hobbs family. *Id.*

Hobbs is instructive in our application of the special relationship exception to the present case. Viewing the facts alleged in the light most favorable to the minor children-plaintiffs, as we are required to do, *Bruce-Terminex Co.*, 130 N.C. App. at 733, 504 S.E.2d at 577, the evidence shows that Ms. Hemphill actively made efforts to assist Mr. Oakes in securing a place to stay with Ms. Blaylock and Mr. Ledford. She not only directly called Ms. Blaylock, but she drove Mr. Oakes to the Blaylock/Ledford home where she specifically spoke with Mr. Ledford. In this conversation, Ms. Hemphill and Mr. Ledford dis-

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cussed Mr. Oakes' need to attend mental health and his mandatory probation appointments with Ms. Hemphill. Despite the fact that Ms. Hemphill saw small children in the home, she did not inform Mr. Ledford about Mr. Oakes' charges of indecent exposure and assault or his past history as a sexual offender. Finally, before she left, Ms. Hemphill gave Mr. Ledford her card and instructed him to call her if he had any problems. The relationship between the minor children-plaintiffs and Ms. Hemphill in this case, like the relationship between the parties in *Hobbs*, was direct and personal. See *Hobbs*, 135 N.C. App. at 419, 520 S.E.2d at 601. Additionally, as a result of Ms. Hemphill's actions, the minor children-plaintiffs were placed at a greater risk of being sexually assaulted than they would have been had Mr. Oakes not been placed in their home. Therefore, these facts taken together create an issue as to whether Ms. Hemphill's negligent conduct in actively placing Mr. Oakes in the Blaylock/Ledford home without properly warning the family "cause[d] the victim(s) to detrimentally rely on [her] such that the risk of harm as the result of [her] negligence is something more than that to which the victim[s] were] already exposed." *Vanasek*, 132 N.C. App. at 338, 511 S.E.2d at 44 (internal quotation marks omitted). Accordingly, there is a genuine issue as to whether a special relationship existed between defendant and the minor children-plaintiffs.

The Full Commission, in reaching its conclusion that a special relationship existed in the present case, relied on the mandatory reporting requirements set forth in N.C.G.S. § 7B-301. After careful review, we, however, conclude that reliance on this statute in the present case is inappropriate. N.C.G.S. § 7B-301 provides that "Any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent, as defined by G.S. 7B-101 . . . shall report the case of that juvenile to the director of the department of social services" N.C. Gen. Stat. § 7B-301 (2007). Although this Court held in *Smith* that N.C.G.S. § 7B-301 prevented the application of the public duty doctrine in that case, the facts in the present case require a different result. 168 N.C. App. at 462, 608 S.E.2d at 407-08. There, the plaintiff specifically alleged that the school resource officer was negligent by failing to report knowledge of a teacher's actions in promoting a sexual relationship between the plaintiff, who was a student, and another student. 168 N.C. App. at 461, 608 S.E.2d at 407. In the present case, the minor children-plaintiffs have not alleged that defendant, through Ms. Hemphill, was negligent in failing to report any known child abuse of the minor children-plaintiffs by Mr. Oakes. Therefore, this statute is inapplicable to the facts of this case. Hence,

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a special relationship is not created through N.C.G.S. § 7B-301 but instead through the nature of the relationship between defendant through its agent, Ms. Hemphill, and the minor children-plaintiffs.

Therefore, we hold that the public duty doctrine, though applicable to the present case, does not bar plaintiff's claim, as there is a genuine issue regarding the existence of a special relationship between defendant, through its agent Ms. Hemphill, and the minor children-plaintiffs. Accordingly, we affirm the Full Commissions denial of defendant's summary judgment motion.

Affirmed.

Judges BRYANT and GEER concur.

JUSTIN PHILLIPS, BY AND THROUGH GUARDIAN AD LITEM, TERESA BATES, PLAINTIFF V.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA09-100

(Filed 3 November 2009)

1. Tort Claims Act— drop to shoulder of highway—findings

In a Tort Claims action involving an automobile accident, there was competent evidence in the record to support the Industrial Commission's findings concerning a drop of four-and-one-half to six inches between a roadway and the shoulder.

2. Highways and Streets— drop to shoulder of highway—no notice to Department of Transportation—no negligence

Given the unchallenged evidence, it could not be said that the Industrial Commission erred by determining that the Department of Transportation (DOT) lacked actual or constructive notice of a drop of several inches between the highway and the shoulder in a Tort Claims case arising from an automobile accident. Those findings supported the conclusion that DOT did not negligently breach its duty.

3. Appeal and Error— preservation of issues—no supporting findings or conclusion—argument abandoned

An argument was abandoned where plaintiff argued that the Industrial Commission erred by finding that plaintiff did not meet

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his burden of proof, but did not point to a finding or conclusion supporting that contention.

4. Highways and Streets— Department of Transportation's duty to general public—maintenance—reasonable care

The Industrial Commission did not err in a Tort Claims case by finding that DOT's duty to the general public includes reasonable care in maintaining highways, which is consistent with N.C.G.S. § 143B-346.

Appeal by plaintiff from Decision and Order entered 6 August 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 August 2009.

Attorney General Roy Cooper, by Assistant Attorney General Tina L. Hlabse, for the State.

Law Offices of Jonathan S. Dills, P.A., by Jonathan S. Dills for plaintiff-appellant.

BRYANT, Judge.

Plaintiff appeals from a Decision and Order of the Full Commission of the North Carolina Industrial Commission filed 6 August 2008 which denied plaintiff's claim for benefits under the North Carolina Tort Claims Act. For the reasons stated herein, we affirm the Decision and Order of the Commission.

Facts

On 11 July 1999, Richard Phillips was driving on Highway 158 in Forsyth County, North Carolina. Justin Phillips (plaintiff), Richard's 14-year-old son, was seated in the rear seat. While traveling on Highway 158, the vehicle ran off the right side of the road onto the shoulder. In an attempt to regain control, Richard turned the vehicle into on-coming traffic and then again off the roadway. The vehicle ultimately hit a tree, and plaintiff sustained serious injuries to his head and shoulder. Defendant, North Carolina Department of Transportation (DOT), stipulated that plaintiff's damages exceeded \$500,000.00.

At a hearing conducted before Deputy Commissioner George T. Glenn II, plaintiff's father testified that the cause of the accident was "a tremendous dropoff [sic]" between the pavement and the shoulder of the road which caused him to lose control of the vehicle. Evidence

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indicated the drop-off where the Phillips' vehicle left the road was between four-and-a-half to six inches.

DOT division engineer Steven Ivey testified that he was the administrator responsible for maintenance and construction of all state-maintained highways in a five-county area, including Forsyth County and the subject section of Highway 158. Ivey introduced DOT's maintenance management manual, which is a compilation of state wide guidelines and regulations. Ivey described the manual as a field operations guide for maintenance operations. Two conditions listed under the maintenance management manual section entitled "Conditions which warrant the scheduling of unpaved shoulder maintenance?" state "[w]hen the area adjacent to the pavement is approaching a three-inch dropoff [sic]" and "[w]hen a resurfacing project results in more than a one-inch dropoff [sic]."

Ivey further testified that though he managed the maintenance and construction of state roads, in Forsyth County, Forsyth County maintenance engineer, Gary Neal, would oversee the maintenance and inspection of state-maintained roads in Forsyth County. Neal testified that as the Forsyth County maintenance engineer it was his duty to oversee the maintenance of all state-maintained roads in Forsyth County, including Highway 158. Specifically, Neal acknowledged that his department would be responsible for maintaining Highway 158 if there was erosion or degradation or just a disparity in height between the roadway and the shoulder of the roadway. However, on the topic of inspection, Neal testified as follows:

Neal: As we—as me and some of my employees—we make observations if we ride down a road and, if we traveled that road and saw that low shoulder and we're supervisory personnel . . . saw that shoulder, I would say, 'This is something we need to come back and repair.' And what we would do—we would schedule it. But there's twelve hundred miles of road in Forsyth County. . . . We make observations. We depend a lot on citizens letting us know problems—drainage problems, shoulder problems, pavement problems, and that's how our maintenance work is set up.

Forsyth County has more than twelve hundred miles of roadway, and approximately fifty DOT employees. Neal testified that DOT received no complaints about the area's drop-off prior to the accident and he was unaware of any dips in the roadway where the accident

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occurred. However, had he been made aware of the drop-off, the area would have been barricaded, posted, and repaired.

Neal testified that Highway 158 was resurfaced sometime in 1998 and shoulder maintenance was performed sometime in April 1999, 22 June 1999, and sometime in July 1999.

Thomas Martin, a witness to the accident, testified that Highway 158 had been resurfaced two weeks prior to the accident. He also testified that the shoulder was not graded thereafter to address the significant drop-off.

The Deputy Commissioner concluded that DOT “was negligent in failing to have an inspection schedule and failing to inspect US Highway 158 to determine whether its condition was safe for the traveling public and that that negligence was a proximate cause of the motor vehicle accident plaintiff was involved in” DOT was ordered to pay plaintiff \$500,000.00. DOT appealed to the Full Commission (the Commission).

On 12 February 2008, after reviewing the Opinion and Award entered by the Deputy Commissioner and the briefs and arguments made to the Commission, the Commission entered a Decision and Order which reversed the Opinion and Award of the Deputy Commissioner and ordered that plaintiff’s claim for benefits under the North Carolina Tort Claims Act be denied. Plaintiff appeals.

On appeal, plaintiff raises eight issues: whether the North Carolina Industrial Commission erred (I) in making certain findings of fact; (II) in premising its conclusions of law on said findings; (III) in finding that plaintiff failed to meet his burden of proving NCDOT’s negligence, (IV) in failing to consider NCDOT’s admitted notice of problems with erosion, (V) in ignoring the State’s admissions regarding NCDOT’s obligation to inspect, (VI) in its use of discretion, (VII) in applying previous case precedent, and (VIII) in concluding that no duty was owed to plaintiff and/or that the public duty doctrine applies.

Standard of Review

Under the Tort Claims Act, when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission’s findings of fact, and (2) whether the Commission’s findings of fact justify its conclusions of law and decision.

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Fennell v. N.C. Dep't of Crime Control & Pub. Safety, 145 N.C. App. 584, 589, 551 S.E.2d 486, 490 (2001) (citation and internal quotations omitted).

I

[1] Plaintiff questions whether the Commission erred in making findings of fact 6, 12, 14, and 15. Plaintiff argues there was no competent evidence to support a finding that the drop-off between the roadway and the shoulder of the road was less than six inches, as stated in findings of fact 6 and 12, and that in findings of fact 14 and 15 the Commission makes inaccurate conclusions of law. We disagree.

We consider each of the Commission's challenged findings of fact in turn. In finding of fact number 6, the Commission stated the following:

6. Mr. Martin had noticed that there was a drop off from the paved portion of the highway to the unpaved portion of the highway of four and one-half to five inches

Martin gave the following testimony before the Deputy Commissioner:

Martin: Basically, as I stated earlier, [the roadway] had been recently topped. . . . There was—there was approximately—about this much difference between the top of the road and the ground, which, I'd say, is about four and half—five inches.

We hold there was competent evidence submitted on the record to support the Commission's finding of fact number 6.

Next, plaintiff challenges the Commission's finding of fact number 12.

12. Mr. Ivy [sic] and Mr. Neal agreed a drop off of four and one-half to six inches from the paved to the unpaved portion of any road creates a hazardous condition for the traveling public that needs immediate attention. Furthermore, in accordance with NCDOT guidelines, any time the unpaved portion of a roadway is 3 or more inches below the grade of the paved portion of the roadway, the drop off condition should be repaired quickly.

Neal gave the following testimony before the Deputy Commissioner:

Counsel: Would you agree that's a significant dropoff?

Neal: Yes.

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Counsel: More than half a foot?

Neal: I wouldn't say it's more than half a foot, but it was significant.

...

Neal: If we would have known about that, we would have—let's say somebody had called us the day before and say we had a significant dropoff there. We would have went out there and looked at that. We would have got barricades out there and put them up until we could have got it repaired—until we could have got—scheduled repair, which would have been done quickly.

Ivey submitted the following testimony:

Ivey: [The DOT maintenance management manual] is a document that the field operations uses as a guide for maintenance operations across the state.

...

[I]t is a guide for our maintenance personnel in determining the type of maintenance and repairs that need to be done on state-maintained roads.

...

Counsel: And could you read the section . . . under . . . "Conditions which warrant the scheduling of unpaved shoulder maintenance?"

...

Ivey: "When the area adjacent to the pavement is approaching a three-inch dropoff."

We hold that there was competent evidence in the record to support of the Commission's finding of fact number 12.

Defendant also argues that the Commission's findings of fact numbers 14 and 15 are inaccurate conclusions of law.

14. The standard of care applicable to this case is negligence. Defendant's duty to the general public is to plan, design, locate, construct and maintain the public highways in the State of North Carolina, with reasonable care. Defendant is not strictly liable for every person injured on the roads subject to its jurisdiction.

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15. Several factors are relevant to defendant's performance of its duties including, but not limited to, funding limitations, staffing limitations and prioritizing and coordinating construction projects. The evidence reveals that defendant has 1200 miles of State maintained roads in Forsyth County and a staff of approximately 50 employees. Their numerous duties include drainage issues, pavement repair, shoulder maintenance, dead animal pick-up, snow and debris removal, inspection of driveway permits and encroachments, maintenance of guardrails, and a multitude of other repairs. By necessity, defendant relies on reports from the traveling public, observations by defendant's employees, or law enforcement reports in ascertaining where problems exist on the roadways. In light of defendant's limited resources and the number of duties, defendant's reliance on reports from the traveling public, observations by defendant's employees, or law enforcement reports in ascertaining where problems exist on the roadways, is reasonable.

Plaintiff filed a claim for damages against DOT under the North Carolina Tort Claims Act, N.C. Gen. Stat. § 143-291, *et seq.* DOT is subject to a suit to recover damages caused by its negligence only as is provided in the Tort Claims Act. *Drewry v. North Carolina Dep't of Transp.*, 168 N.C. App. 332, 336, 607 S.E.2d 342, 346 (2005) (citation omitted).

Under the Tort Claims Act . . . , negligence is determined by the same rules as those applicable to private parties. Plaintiff must show that (1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury.

Id. at 337, 607 S.E.2d at 346 (citing N.C. Gen. Stat. § 143-291(a) (2003)) (external citation and internal quotations omitted). Therefore, we hold that the Commission's finding of fact number 14, "[t]he standard of care applicable to this case is negligence[.]" is merely a statement of the law applicable to the dispute between plaintiff and DOT and consistent with the North Carolina General Statutes and prior holdings of this Court.

Regarding finding of fact number 15, plaintiff does not dispute the Commission's findings that there are 1,200 miles of state-maintained roads in Forsyth County or that there were 50 Forsyth County

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staff members responsible for maintaining those roads. Plaintiff argues that the Commission's conclusion that "defendant's reliance on reports from the traveling public, observations by defendant's employees, or law enforcement reports in ascertaining where problems exist on the roadways" was a necessity, was erroneous. We address this argument in the discussion under sections II, IV, V, VI, and VII.

Accordingly, we overrule the assignment of error that pertains to the Commission's finding of fact number 14 and consider the assignment of error that pertains to finding of fact number 15 in the discussion below.

II, IV, V, VI, & VII

[2] Plaintiff argues that the Commission made an error of law by extrapolating *Hochhesier v. North Carolina Dep't of Transp.*, 82 N.C. App. 712, 348 S.E.2d 140 (1986), to mean that DOT does not have a mandatory duty to inspect state-maintained roadways.

The Commission stated the following conclusion:

3. The [DOT] is vested with broad discretion in carrying out its duties and responsibilities with respect to the design and construction of our public highways. The policies of the Board of Transportation and the Department of Transportation and the myriad discretionary decisions made by them as to design and construction are not reviewable by the judiciary "unless [their] action is so clearly unreasonable as to amount to oppressive and manifest abuse." *Hochhesier v. N.C. Dep't of Transp.*, 82 N.C. App. 712, 348 S.E.2d 140 (1986), *aff'd by* 321 N.C. 117, 361 S.E.2d 562 (1987)

We consider whether DOT's reliance on reports from the traveling public, observations of its employees, and law enforcement reports amounts to a breach of duty which would subject DOT to a claim for negligence.

In *Hochhesier*, the issue before this Court was whether DOT could be held liable under the North Carolina Tort Claims Act for failing to place a guardrail along a secondary road where the plaintiff's car ran off the road and down an embankment. *Id.* at 715, 348 S.E.2d at 141. This Court reasoned as follows:

The Department of Transportation has the authority, duty and responsibility to plan, design, locate, construct and maintain the

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system of public highways in this State. The Department is vested with broad discretion in carrying out its duties and responsibilities with respect to the design and construction of our public highways.

Id. at 7178, 348 S.E.2d at 142-43 (internal citations omitted). However, the *Hochhesier* Court was not considering “a situation in which [DOT] failed properly to maintain and repair an existing highway under its control.” *Id.* at 717, 348 S.E.2d at 142.

In *Phillips v. North Carolina Dep't of Transp.*, 80 N.C. App. 135, 341 S.E.2d 339 (1986), we considered whether the Industrial Commission properly denied recovery where the plaintiffs alleged injury as a proximate result of DOT's failure to maintain a highway under its control. We determined that the Tort Claims Act “extend[ed] the State's liability to include the negligent omissions and failures to act of its employees.” *Id.* at 137, 341 S.E.2d at 341. The plaintiffs alleged that DOT failed to remove a hazard in close proximity to a right-of-way DOT had a duty to maintain; DOT had notice of the hazard; and DOT had substantial time to remove it—more than thirty years. *Id.* at 138, 341 S.E.2d at 341.

“The happening of an injury does not raise the presumption of negligence. There must be evidence of notice either actual or constructive.” *Willis v. City of New Bern*, 137 N.C. App. 762, 765, 529 S.E.2d 691, 693 (2000) (citation omitted).

[N]otice may be either actual, which brings the knowledge of a fact directly home to the party, or constructive, which is defined as information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it.

State v. Poteat, 163 N.C. App. 741, 746, 594 S.E.2d 253, 255-56 (2004) (external citation and internal quotations and brackets omitted).

Here, the Commission stated the following conclusion:

4. In the present case, defendant's reliance from the traveling public, observations by defendant's employees, and law enforcement reports in ascertaining where problems exist on the roadways and the determination of priority in which to repair them constitutes a discretionary decision and is not a negligent breach of its duty.

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The issue is whether DOT had notice of the drop-off between the paved roadway and the unpaved shoulder along Highway 158. *See Willis*, 137 N.C. App. at 765, 529 S.E.2d at 692-93. The Commission made the following unchallenged findings of fact:

7. Mr. Martin . . . had [not] reported to the North Carolina Department of Transportation . . . the drop off between the paved portion of the roadway and the unpaved portion of the roadway prior to this accident.

. . .

11. Mr. Neal stated that had the problem described by Mr. Martin . . . regarding the drop off from the paved portion to the unpaved portion of Highway 158 come to either his or any of his employees' attention, his office would have immediately inspected the problem and, if needed, would have placed warning signs and scheduled the needed repairs.

Absent evidence that DOT had actual notice of the drop-off between the paved roadway and the unpaved shoulder of Highway 158, we consider whether DOT had constructive notice. "Constructive knowledge of a dangerous condition can be established in two ways: the plaintiff can present direct evidence of the duration of the dangerous condition, or the plaintiff can present circumstantial evidence from which the fact finder could infer that the dangerous condition existed for some time." *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000) (citation omitted). Pertinent to this discussion and in support of the Commission's finding of fact number 11, Neal gave the following testimony before the Deputy Commissioner:

Neal: I'm saying, every time a tractor and trailer pulls off the shoulder of the road, it doesn't—you may have the—you may fix the shoulder today. It may last six weeks. It may last six months. It may just last six days. It has a lot to do with how much moisture the shoulder gets on it, how many trucks pull off of it. There's a whole lot of particulars that cause this, so you could fix the shoulder this week and it may stay there for a long time. You may come back in—three days later because it rained, or whatever, and you have a problem there.

Given the unchallenged findings of fact, we cannot say that the Commission erred in determining that DOT lacked both actual or

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constructive notice of the drop-off along Highway 158 between the roadway and the roadside shoulder. Therefore, we hold that the findings of fact support the Commission's conclusion that DOT did not negligently breach its duty. Accordingly, plaintiff's assignments of error are overruled.

III

[3] Next, plaintiff argues that the Commission erred by finding that plaintiff failed to meet his burden of proving defendant's negligence. However, plaintiff directs our attention to no specific finding of fact or conclusion of law which would allow us to consider "(1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Fennell*, 145 N.C. App. at 589, 551 S.E.2d at 490 (citation omitted). Accordingly, we deem this argument abandoned.

VIII

[4] Next, plaintiff argues that the Commission erred in findings of fact numbers 13 and 14 because such findings indicate that DOT owed no duty to plaintiff and/or that the public duty doctrine applies. We disagree.

The Commission made the following findings of fact:

13. Defendant has the authority, duty and responsibility to plan, design, locate, construct and maintain the existing public highways in the State of North Carolina. In so doing, defendant acts for the benefit of the general public.
14. The standard of care applicable to this case is negligence. Defendant's duty to the general public is to plan, design, locate, construct and maintain the public highways in the State of North Carolina, with reasonable care. Defendant is not strictly liable for every person injured on the roads subject to its jurisdiction.

The Commission states that "[DOT]'s duty to the general public is to plan, design, locate, construct and maintain the public highways in the State of North Carolina, with reasonable care." This is consistent with North Carolina General Statutes, section 143B-346.¹ Moreover,

1. Under North Carolina General Statutes, section 143B-346, "[t]he general purpose of the Department of Transportation is to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation sys-

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the Commission does not otherwise discuss the public duty doctrine in its findings of fact or conclusions. Accordingly, we overrule these assignments of error.

Affirmed.

Chief Judge MARTIN and Judge HUNTER, Robert C. concur.

STATE OF NORTH CAROLINA v. GARY FRANCES MELLO

No. COA08-1054

(Filed 3 November 2009)

1. Constitutional Law— ordinance—loitering for the purpose of drug activity—overbroad

An ordinance was unconstitutionally overbroad where it prohibited loitering in a public place under circumstances manifesting the purpose of violating the Controlled Substances Act. The ordinance did not require proof of intent and criminalizes constitutionally permissible conduct.

2. Constitutional Law— ordinance—loitering for the purpose of drug activity—vagueness

An ordinance which prohibited loitering in such a manner as to raise a reasonable suspicion of drug activity was unconstitutionally vague because it did not clarify the behavior the provision governs. Arresting a person on suspicion alone is also unconstitutional.

3. Appeal and Error— preservation of issues—failure to cite authority—objection on other grounds at trial

An assignment of error was dismissed for not citing authority for the argument that a conviction must be dismissed if the State did not show beyond a reasonable doubt that the admission of challenged evidence did not effect the verdict. Furthermore, defendant's objections at trial were on other grounds.

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4. Sentencing— remand of consolidated judgment—sentence completed

A judgment in which four charges were consolidated was remanded for resentencing even if defendant had served his sentence on all charges where one of the charges was based on an unconstitutional ordinance.

Appeal by defendant from judgment entered 14 November 2007 by Judge Henry E. Frye, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 7 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Glover & Peterson, P.A., by James R. Glover, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendant Gary Frances Mello (“defendant”) appeals his conviction under Winston-Salem City Ordinance § 38-29 (“the Ordinance”) for loitering for the purpose of engaging in drug-related activity. Defendant argues that the Ordinance is unconstitutional on grounds of overbreadth and vagueness. We agree.

I. Background

On 25 February 2007 and 4 June 2007, a Forsyth County Grand Jury returned superseding indictments charging defendant with the following offenses allegedly committed on 28 August 2006: three counts of assaulting a government official (involving Officers J.R. Pritchard, D.J. Hege, and B.G. Extrom of the Winston-Salem Police Department); one count of loitering for the purpose of engaging in drug-related activity; and two counts of failing to heed a blue light and siren.

The charges came for trial on 29 October 2007, with the Honorable Henry E. Frye, Jr., presiding. Defendant filed a motion to exclude evidence of his 26 August 2006 encounter with Officer Pritchard on grounds of unfair prejudice and irrelevance. On 31 October 2007, the trial court denied defendant’s motion to dismiss the loitering charge on the grounds that the Ordinance was unconstitutional and conducted a voir dire hearing to determine whether the State could introduce Rule 404(b) evidence relating to Officer Pritchard’s traffic stop of defendant on 26 August 2006. During voir

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dire, defendant contended that introducing such evidence violated the balancing test set out in Rule 403. Over defendant's objection, the trial court allowed Officer Pritchard to testify about his encounter with defendant on 26 August 2006.

On 14 November 2007, the jury found defendant guilty of one count of assault with a deadly weapon upon a government official (Officer Pritchard), one count of loitering for the purpose of engaging in drug-related activity, and two counts of failure to heed light or siren. In a judgment entered 14 November 2007, the trial court consolidated the four convictions for judgment, determined that defendant had a prior record level of II, and sentenced him to 19 to 23 months of imprisonment. Defendant appeals.

II. Winston Salem City Ordinance § 38-29

[1] Defendant argues that the trial court erred in denying his motion to dismiss the charge of loitering for the purpose of engaging in drug-related activity and contends that the Ordinance is unconstitutionally overbroad and vague. The Ordinance provides that:

- (b) It shall be unlawful for a person to remain or wander about in a public place under circumstances manifesting the purpose to engage in a violation of the North Carolina Controlled Substances Act, G.S. 90-89 et seq. Such circumstances are:
- (1) Repeatedly beckoning to, stopping or attempting to stop passersby, or repeatedly attempting to engage passersby in conversation;
 - (2) Repeatedly stopping or attempting to stop motor vehicles;
 - (3) Repeatedly interfering with the free passage of other persons;
 - (4) Such person behaving in such a manner as to raise a reasonable suspicion that he is about to engage in or is engaged in an unlawful drug-related activity;
 - (5) Such person repeatedly passing to or receiving from passersby, whether on foot or in a vehicle, money or objects;
 - (6) Such person taking flight upon the approach or appearance of a police officer; or
 - (7) Such person being at a location frequented by persons who use, possess or sell drugs.

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Winston-Salem City Ordinance § 38-29(b) (2009). The indictment alleged that defendant violated § 38-29(b)(4) and (7) of the Ordinance by “behaving in such a manner as to raise a reasonable suspicion that he is about to engage in or is engaged in an unlawful drug-related activity” and being “at a location frequented by persons who use, possess or sell drugs[.]” *See id.*

“In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground.” *Guilford Co. Bd. of Education v. Guilford Co. Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993). When examining the constitutional propriety of legislation, “[w]e presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality.” *State v. Evans*, 73 N.C. App. 214, 217, 326 S.E.2d 303, 306 (1985).

A. Overbreadth

A law is impermissibly overbroad if it deters a substantial amount of constitutionally protected conduct while purporting to criminalize unprotected activities. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494, 71 L. Ed. 2d 362, 369, *reh’g denied*, 456 U.S. 950, 72 L. Ed. 2d 476 (1982). Legislative enactments that encompass a substantial amount of constitutionally protected activity will be invalidated even if the statute has a legitimate application. *Houston v. Hill*, 482 U.S. 451, 459, 96 L. Ed. 2d 398, 410 (1987). When raising an overbreadth challenge, the challenger has the right to argue the unconstitutionality of the law as to the rights of others, not just as the ordinance is applied to him. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 37 L. Ed. 2d 830, 840 (1973).

In *Evans*, we upheld the constitutionality of a statute that prohibited loitering for the purpose of engaging in prostitution, because it required that the person engage in certain acts “for the purpose of violating” anti-prostitution laws. *Evans*, 73 N.C. App. at 216-18, 326 S.E.2d at 306-07. We reasoned that, although some of the acts encompassed in the loitering statute were constitutionally permissible (*i.e.*, repeatedly attempting to engage passersby in conversation, repeatedly stopping vehicles), the statute “require[d] proof of *specific criminal intent*, the missing element in unconstitutional ‘status’ offenses such as simple loitering.” *Id.* at 217, 326 S.E.2d 307 (emphasis added).

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Contrary to the statute at issue in *Evans*, the present Ordinance does not require proof of intent to violate a drug law, but imposes liability solely for conduct that “manifests” such purpose. The State’s assertion that we upheld similar language in *Evans* has no merit. In *Evans*, we stated that:

American courts have overwhelmingly upheld enactments such as G.S. § 14-204.1 which include an element of criminal intent. Two cases from the Washington Supreme Court illustrate precisely the rationale applied. In *City of Seattle v. Drew*, 70 Wash. 2d 405, 423 P. 522 (1967), the court struck down an ordinance which criminalized “wandering abroad” without “satisfactory account.” The City then amended the ordinance, adding the requirement that the loitering be “under circumstances manifesting” unlawful purpose. The court upheld the amended ordinance. *City of Seattle v. Jones*, 79 Wash. 2d 626, 488 P. 2d 750 (1971). The United States Supreme Court has approved a similar holding by dismissing for want of a substantial federal question. *Matter of D.*, 27 Or. App. 861, 557 P. 2d 687 (1976) (“under circumstances manifesting” unlawful purpose) *appeal dismissed sub nom. D. v. Juvenile Dept. of Multnomah County*, 434 U.S. 914 (1977) Our statute is functionally equivalent to these enactments, since intent or purpose ordinarily must be shown by circumstantial evidence. Accordingly, we hold that the statute is not void for overbreadth.

Id. at 218, 326 S.E.2d at 307. In *Evans*, we did not interpret the phrase, “under circumstances manifesting,” as the anti-prostitution loitering statute did not contain such language. The law of the case doctrine applies only to “points actually presented and necessary for the determination of the case and not to dicta.” *Kanipe v. Lane Upholstery*, 151 N.C. App. 478, 485, 566 S.E.2d 167, 171, *disc. review denied, disc. review dismissed*, 356 N.C. 303, 570 S.E.2d 724-25, *petition for reconsideration dismissed*, 356 N.C. 437, 572 S.E.2d 784 (2002). Thus, our citation to cases in other jurisdictions which upheld the constitutionality of such language was dicta, which is not binding on the present case.

Contrary to the State’s assertion, the Ordinance in the case sub judice does not require proof of specific criminal intent.¹ The

1. We note during defendant’s trial the jury was not instructed that defendant was required to have the intent or purpose to violate the Controlled Substances Act to be found guilty of loitering for the purpose of drug-related activity.

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Ordinance lists seven types of actions, each of which, by definition, is “conduct that manifests a purpose” to violate a drug law. Winston-Salem City Ordinance § 38-29(b).

Because the Ordinance fails to require proof of intent, it attempts to curb drug activity by criminalizing constitutionally permissible conduct. Under the Ordinance, anyone who engages in the conduct listed in Ordinance § 38-29(b)(1)-(7) is deemed to possess the requisite intent to engage in drug-related activity, regardless of his or her actual purpose. A law which criminalizes a substantial amount of constitutionally permissible conduct is unconstitutionally overbroad. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 164-65, 31 L. Ed. 2d 110, 117 (1972) (characterizing the right to walk, stroll, or wander with no apparent purpose as an aspect of liberty within “the sensitive First Amendment area”); *Coates v. Cincinnati*, 402 U.S. 611, 614, 29 L. Ed. 2d 214, 217-18 (1971) (holding that a law that prohibited people from congregating in public and engaging in annoying activities abridged the First Amendment right of assembly); *Evans*, 73 N.C. App. at 217, 326 S.E.2d at 306 (“Mere presence in a public place cannot constitute a crime.”); *Sawyer v. Sandstrom*, 615 F.2d 311, 316 (5th Cir. 1980) (concluding that an ordinance which prohibited a person from loitering while knowing that a narcotic was being unlawfully possessed violated the First Amendment for “criminaliz[ing] ordinary associational conduct not constituting a breach of the peace”).

Thus, the Ordinance permits the police to arrest a person who socializes at a community event for “repeatedly attempting to engage passersby in conversation[.]” Winston-Salem City Ordinance § 38-29(b)(1). Anyone who attempts to flag down taxicabs violates the Ordinance by “[r]epeatedly stopping or attempting to stop motor vehicles[.]” *Id.* at (b)(2). If an individual stops people on the sidewalk to conduct a public survey, he is “repeatedly interfering with the free passage of other persons[.]” *Id.* at (b)(3). Somebody who hands out fliers in public or collects donations is “repeatedly passing to or receiving from passersby . . . money or objects[.]” *Id.* at (b)(5). A person who walks in the opposite direction of a police officer that he observes could be considered to be “taking flight upon the approach or appearance of a police officer[.]” *Id.* at (b)(6). A person who is present in an area where drug arrests have occurred or drug-dealers have visited, can be arrested for “being at a location frequented by persons who use, possess or sell drugs.” *Id.* at (b)(7). Accordingly, we hold the Ordinance to be unconstitutionally overbroad.

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B. Vagueness

[2] The Fourteenth Amendment's due process clause requires that laws be sufficiently clear to provide notice of what is prohibited and provide minimum guidelines to those who enforce such laws. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 227 (1972). "A statute is 'void for vagueness' if it forbids or requires doing an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *State v. Worthington*, 89 N.C. App. 88, 89, 365 S.E.2d 317, 318 (citation omitted) (quoting *Coates*, 402 U.S. 611, 29 L. Ed. 2d 214), *appeal dismissed*, 322 N.C. 115, 367 S.E.2d 134 (1988).

When evaluating whether a person of ordinary intelligence could determine what conduct is prohibited, "[o]nly a reasonable degree of certainty is necessary, mathematical precision is not required." *State v. Sinnott*, 163 N.C. App. 268, 274, 593 S.E.2d 439, 443, *appeal dismissed*, 358 N.C. 738, 602 S.E.2d 678 (2004), *cert. denied*, 544 U.S. 962, 161 L. Ed. 2d 604 (2005). The purpose of this fair notice requirement is to enable a citizen to conform his or her conduct to the law. *Chicago v. Morales*, 527 U.S. 41, 58, 144 L. Ed. 2d 67, 81 (1999); *see Lanzetta v. New Jersey*, 306 U.S. 451, 453, 83 L. Ed. 888, 890 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.").

An anti-gang loitering ordinance which forbids a person "to remain in any one place with no apparent purpose" was held to be unconstitutionally vague. *Chicago*, 527 U.S. at 56-57, 144 L. Ed. 2d at 80. The United States Supreme Court found that the ordinance did not provide citizens sufficient notice of how to conform their conduct to the law, explaining that

it is difficult to imagine how any [person] standing in a public place with a group of people would know if he or she had an 'apparent purpose.' If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?

Id.

Our Court ruled that a statute that prohibited members of the opposite sex from occupying the same hotel room for "immoral purposes" was unconstitutionally vague. *State v. Sanders*, 37 N.C. App. 53, 55, 245 S.E.2d 397, 398 (1978). A person of ordinary intelligence

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would have difficulty ascertaining what would encompass an “immoral purpose,” and instead, would have to speculate as to what acts were criminal. *Id.*

It is unreasonable to expect an average citizen to predict what conduct is considered to be “behaving in such a manner as to raise a reasonable suspicion that he is about to engage in or is engaged in an unlawful drug-related activity.” Winston-Salem Ordinance § 38-29(b)(4) (2009). The Ordinance, here, fails to define what type of conduct violates this provision, and leaves ordinary persons uncertain on how to adhere to the law.

Furthermore, a reasonable suspicion of illegal activity is not sufficient to justify an arrest, as the Fourth Amendment requires the police to have probable cause before making an arrest. *Papachristou*, 405 U.S. at 169, 31 L. Ed. 2d at 119. Arresting a person on suspicion alone is prohibited by our Constitution. *Id.*; see also *Sawyer*, 615 F.2d at 317 (“[I]f the purpose of the [anti-drug loitering] ordinance is to nip crime in the bud by providing police with the means to arrest all suspicious persons, it is patently unconstitutional.”).

In accordance with these principles, we hold § 38-29(b)(4) of the Ordinance to be unconstitutionally vague, as it fails to clarify what behavior this provision governs. Furthermore, this section violates the Fourth Amendment by allowing the police to arrest in the absence of probable cause.

III. Motion to Suppress 26 August 2006 Traffic Stop

[3] Defendant argues that the trial court erred in denying his motion to suppress evidence in case No. 06CRS06008, and assigns error to the admission of such evidence in this case. We dismiss the assignment of error, as it was not properly preserved for appellate review.

In case No. 06CRS06008, defendant filed a motion to suppress evidence obtained from Officer Pritchard’s traffic stop of defendant on 26 August 2006, which resulted in defendant’s arrest for felony possession of cocaine and possession of drug paraphernalia. In his motion, defendant argued that Officer Pritchard lacked reasonable suspicion to stop his vehicle. The trial court denied defendant’s motion to suppress on 31 August 2007.²

2. Our decision on whether Officer Pritchard had reasonable suspicion to conduct an investigatory stop of defendant’s vehicle on 26 August 2006 is addressed in our opinion for *State v. Mello*, — N.C. App. —, — S.E.2d — (COA08-1052) (filed 3 November 2009)).

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Over defendant's objections, the trial court allowed Officer Pritchard to testify about his traffic stop of defendant on 26 August 2006 for purposes of Rule 404(b). Accordingly, the jury instructions provided that the Rule 404(b) evidence could only be considered for the limited purposes of: showing that defendant had the intent to assault Officer Pritchard on 28 August 2006, opportunity to commit the crime, a plan or scheme that involved the crimes charged, and the absence of mistake or accident.

In this appeal, defendant challenges the trial court's admission of this evidence, and argues that defendant's conviction for assault with a deadly weapon upon government official Officer Pritchard must be reversed "unless the State can show beyond a reasonable doubt that it could not have affected the jury's guilty verdicts." Defendant cites no authority for this proposition and makes no argument as to how admitting Officer Pritchard's testimony affected the jury's verdicts. *See* N.C.R. App. P. 28(b)(6) (2009) (requiring arguments presented in the briefs to "contain citations of the authorities upon which the appellant relies").

Furthermore, when Officer Pritchard testified at trial about his encounter with defendant on 26 August 2006, defendant's objections did not address Officer Pritchard's reasonable suspicion to stop defendant. Defendant objected only on grounds of admitting the evidence for purposes of Rule 404(b) and whether such evidence violated the balancing test in Rule 403. To preserve an issue for appellate review, a party is required to raise an objection or motion at the trial level "stating the *specific grounds* for the ruling the party desired[.]" *See* N.C.R. App. P. 10(b)(1) (emphasis added). Given that defendant did not raise objections about Officer Pritchard's lack of reasonable suspicion at trial, we must dismiss the assignment of error. All of defendant's additional assignments of error not set forth in his brief or argued on appeal are deemed abandoned. N.C.R. App. P. 28(b)(6); *State v. Murrell*, 362 N.C. 375, 411, 665 S.E.2d 61, 85, (2008), *cert. denied*, U.S. —, 173 L. Ed. 2d 1099, *reh'g denied*, — U.S. —, 174 L. Ed. 2d 313 (2009).

IV. Conclusion

Defendant's assignment of error that the trial court erred in admitting evidence of Officer Pritchard's 26 August 2006 traffic stop of defendant is dismissed. We hold Winston-Salem City Ordinance § 38-29 to be unconstitutionally overbroad, and § 38-29(b)(4) of the Ordinance to be unconstitutionally vague. We reverse the trial court's denial of defendant's motion to dismiss the charge of loitering for the

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purpose of engaging in drug-related activity and vacate defendant's conviction. Because defendant had four charges consolidated in the judgment entered 14 November 2007, we vacate the judgment and remand this case to the trial court for resentencing on the remaining two charges of failure to heed light or siren and of assault with a deadly weapon upon a government official.³ See *State v. Brown*, 350 N.C. 193, 214, 513 S.E.2d 57, 70 (1999).

Judgment vacated, reversed and remanded in part, and dismissed in part.

Judges JACKSON and ERVIN concur.

STATE OF NORTH CAROLINA v. MAURICE ALFONZO MOBLEY, DEFENDANT

No. COA09-139

(Filed 3 November 2009)

1. Appeal and Error— preservation of issues—Confrontation Clause

A Confrontation Clause claim was not adequately preserved for appeal where defendant objected at trial on other grounds and plain error was not adequately argued.

2. Appeal and Error— Rule 2—plain error review

A Confrontation Clause issue involving DNA test results was heard under Appellate Rule 2 but only under the plain error standard. Defendant did not object appropriately at trial and did not properly preserve the claim of plain error.

3. Constitutional Law— right to confrontation—DNA tests

The admission of testimony from a lab analyst about DNA tests performed by other analysts did not violate the Confrontation Clause where the DNA tests were used as a basis for the witness's expert opinion and the witness independently reviewed and confirmed the results.

[4] 3. If defendant has served his sentence on all charges, judgment must still be vacated and case must be remanded for entry of a judgment that does not include defendant's vacated conviction for loitering for the purpose of drug-related activity.

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4. Evidence— subsequent crime—admitted for intent and modus operandi

There was no error in a rape prosecution in admitting evidence of a subsequent rape under N.C.G.S. § 8C-1, Rule 404(b) where the subsequent rape was nearly two-and-one-half years later but was admitted in part to show intent and *modus operandi*. Remoteness in time was thus less important and the subsequent rape was sufficiently proximate.

Appeal by defendant from judgments entered 30 October 2008 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 September 2009.

Roy Cooper, Attorney General, by Chris Z. Sinha, Assistant Attorney General, for the State.

Geoffrey W. Hosford, for defendant-appellant.

MARTIN, Chief Judge.

Maurice Alfonzo Mobley (“defendant”) appeals from judgments entered pursuant to jury verdicts finding him guilty of three counts of second degree rape, three counts of second degree sexual offense, one count of first degree kidnapping, one count of first degree burglary, and one count of common law robbery. The trial court arrested judgment on the charge of first degree kidnapping and instead entered judgment on second degree kidnapping. The trial court found defendant had a prior record level of IV with eleven prior record points and sentenced defendant to consecutive terms of: 132 to 168 months imprisonment for each of the three second degree rape convictions and three convictions for second degree sexual offense; 46 to 65 months imprisonment for second degree kidnapping; 116 to 149 months imprisonment for first degree burglary; and 19 to 23 months imprisonment for common law robbery. Defendant gave notice of appeal in open court.

At defendant’s trial, the State presented evidence tending to show that, during the late evening and early morning hours of 30 and 31 January 2000, defendant broke into the apartment of the victim and repeatedly raped and sexually assaulted her. Before leaving the victim’s apartment, defendant went through the victim’s purse and other property and took no more than twenty dollars. The victim believed the person who raped her was African-American.

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While the victim was being treated at a local hospital, medical personnel collected evidence for a sexual assault kit and handed the completed kit to a police officer with the Charlotte-Mecklenburg Police Department. Subsequent testing of the evidence in the sexual assault kit matched the DNA profile of the man who raped and assaulted the victim to the DNA profile of defendant. The State also presented testimonial and DNA evidence regarding another rape committed by defendant on 17 May 2002, under N.C.G.S. § 8C-1, Rule 404(b), for the purpose of establishing the identification, intent, and *modus operandi* of defendant. Defendant did not present any evidence at trial.

[1] Defendant first argues the trial court erred in admitting testimony of an analyst at the Charlotte-Mecklenburg Police Crime Lab regarding DNA tests performed by other analysts. Defendant alleges this testimony violates his constitutional right to confront the witnesses against him.

The Sixth Amendment to the United States Constitution provides in part that “[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. The Confrontation Clause forbids “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53-54, 158 L. Ed. 2d 177, 194 (2004). We note that, at trial, defendant only raised an objection to this testimony on hearsay grounds and did not raise the constitutional question. “It is well established that appellate courts will not ordinarily pass on a constitutional question unless the question was raised in and passed upon by the trial court.” *State v. Muncy*, 79 N.C. App. 356, 364, 339 S.E.2d 466, 471, *disc. review denied*, 316 N.C. 736, 345 S.E.2d 396 (1986). However, the North Carolina Rules of Appellate Procedure allow review for “plain error” in criminal cases even where the error is not preserved “where the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(c)(4) (2009) (amended Oct. 1, 2009).

While defendant mentions plain error in passing in his brief, he has not adequately argued plain error. Case law requires that, in order for an appellate court to review for plain error, defendant must bear the burden of showing either “(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a

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fair trial.” *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). An “empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule.” *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). In his brief, defendant merely sets forth the standard of review for plain error and states that the standard is met in this case. Defendant has thus abandoned his claim of plain error and not properly preserved this issue for review. *See* N.C.R. App. P. 28(b)(6) (2009) (amended Oct. 1, 2009) (“Assignments of error not set out in the appellant’s brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.”).

[2] The only remaining avenue open for review of defendant’s claim is review under Rule 2 of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 2. This rule, used to prevent manifest injustice to a party, is exercised “cautiously” and only in “exceptional circumstances [to consider] significant issues of importance.” *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 205 (2007) (internal quotation marks omitted from second quotation), *aff’d after remand*, — N.C. App. —, 673 S.E.2d 799 (2009). However, it has been exercised on several occasions to review issues of constitutional importance. *See State v. Dudley*, 319 N.C. 656, 356 S.E.2d 361 (1987) (using Rule 2 when defendant claimed a violation of the double jeopardy prohibition); *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002) (using Rule 2 to review alleged violation of the prohibition against the enactment of *ex post facto* laws), *cert. denied*, 537 U.S. 1117, 154 L. E. 2d 795 (2003). We conclude that this is an appropriate circumstance in which to exercise this discretionary review. In doing so, however, we apply only the plain error standard of review rather than the constitutional error standard which requires the State to show that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2007); *State v. Lemons*, 352 N.C. 87, 92, 530 S.E.2d 542, 545 (2000), *cert. denied*, 531 U.S. 1091, 148 L. Ed. 2d 698 (2001). Thus, we review to determine whether the alleged error was such that it amounted to a fundamental miscarriage of justice or had a probable impact on the jury’s verdict.

[3] This case requires us to consider the applicability of the United States Supreme Court’s recent decision in *Melendez-Diaz v. Massachusetts*, — U.S. —, 174 L. Ed. 2d 314 (2009). In *Melendez-Diaz*, sworn certificates from analysts affirming that the substance tested was cocaine were determined to be testimonial. Therefore, the

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analysts must be available for cross-examination by the defendant, or the evidence would be inadmissible absent a showing of unavailability and a prior opportunity by the defendant to cross-examine the analysts. Although the Court in *Melendez-Diaz* addressed only drug testing, the Court's analysis easily implicates DNA testing as well.

Our Supreme Court recently addressed *Melendez-Diaz* in *State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (2009). The Court in *Locklear* held that testimony from John Butts, the Chief Medical Examiner of North Carolina, concerning the results of an autopsy and identification of the remains of Cynthia Wheeler, an alleged prior victim, performed by non-testifying experts violated the Confrontation Clause. In its analysis, the Supreme Court pointed to two particular areas of Dr. Butts's testimony. The first concerned the cause of death. According to the Court, Dr. Butts testified that, "according to the autopsy report prepared by Dr. Chancellor, the cause of Wheeler's death was blunt force injuries to the chest and head." *Locklear*, 363 N.C. at 451, 681 S.E.2d at 304. The second concerned the identity of Wheeler. According to the Court, Dr. Butts stated, "by comparing Wheeler's dental records to the skeletal remains, Dr. Burkes positively identified the body as that of Wheeler." *Id.* These excerpts indicate that Dr. Butts was merely reporting the results of other experts. He did not testify to his own expert opinion based upon the tests performed by other experts, nor did he testify to any review of the conclusions of the underlying reports or of any independent comparison performed.

However, the testimony in the case *sub judice* is distinguishable. In this case, the testifying expert, Aby Moeykens, testified not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data. Defendant has not challenged the propriety of the methods used by the crime lab, therefore, Ms. Moeykens was justified in relying on those procedures in her analysis. Her first step in forming her opinion was to review the original data and controls of the underlying reports from the buccal swab and the vaginal swab. Upon coming to the conclusion that each profile was generated properly, she testified in the following manner:

Q. Did you make a technical review of [John Donahue's comparison between the profile in the buccal swab related to Maurice Mobley and the profile obtained from the vaginal swab]?

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A. Yes; I looked both at the original data from Kelly Smith [who performed the vaginal swab] and also the data from the buccal swab run by John Donahue.

Q. Based upon your technical review what did you find?

A. The profile obtained from the sperm cell fraction of the vaginal swab from Sherley Louis matches the profile obtained from the buccal swab of Maurice Mobley.

She, then, testified to how she came to the conclusion that the two profiles matched by comparing the numerical values at certain gene locations. Thus, based on her own review of the reports, she came to the conclusion that the two DNA profiles were a match. Ms. Moeykens also testified to a review of the tests performed by John Donahue in relation to defendant's conviction for the rape of Wanda Hairston, which was presented as 404(b) evidence. She testified to the same review procedure outlined above with regard to this evidence. During direct examination she was asked:

Q. Based upon your review of [John Donahue's] data what opinion did you form?

MR. TROBICH: OBJECTION.

THE COURT: OVERRULED.

A. The DNA profile obtained from the buccal swab from Maurice Mobley matched the DNA profile from the vaginal swab from Wanda Hairston.

Well-settled North Carolina case law allows an expert to testify to his or her own conclusions based on the testing of others in the field. *State v. Delaney*, 171 N.C. App. 141, 144, 613 S.E.2d 699, 701 (2005). This Court has held that evidence offered as the basis of an expert's opinion is not being offered for the truth of the matter asserted. *See State v. Walker*, 170 N.C. App. 632, 635, 613 S.E.2d 330, 333, *disc. review denied*, 359 N.C. 856, 620 S.E.2d 196 (2005). The United States Supreme Court in *Crawford v. Washington* noted that evidence offered for purposes other than proof of the matter asserted did not violate the Confrontation Clause. *Crawford*, 541 U.S. at 59-60 n.9, 158 L. Ed. 2d at 197-198 n.9. In *Melendez-Diaz*, the certificates at issue were being introduced not as the basis for any expert's opinion but as *prima facie* evidence that the substance was cocaine. *Melendez-Diaz*, — U.S. at —, 174 L. Ed. 2d at 320. Thus, such evidence would implicate the Confrontation Clause. By contrast, in this case, the

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underlying report, which would be testimonial on its own, is used as a basis for the opinion of an expert who independently reviewed and confirmed the results, and is therefore not offered for the proof of the matter asserted under North Carolina case law. Therefore, we hold Ms. Moeykens's testimony does not violate the Confrontation Clause even in light of *Melendez-Diaz*. These assignments of error are overruled.

[4] Defendant next argues the trial court erred in permitting the State to introduce evidence regarding defendant's subsequent rape of another woman pursuant to Rule 404(b) of the North Carolina Rules of Evidence. We disagree.

N.C.G.S. § 8C-1, Rule 404(b) provides, in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007).

"[A] careful reading of Rule 404(b) clearly shows[] [that] evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986). The Rule, however, is "constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002), *aff'd on appeal after remand*, 359 N.C. 741, 616 S.E.2d 500 (2005), *cert. denied*, 547 U.S. 1076, 164 L. Ed. 2d 528 (2006). We review a trial court's decision to admit evidence under Rule 404(b) only for abuse of discretion. *State v. Ray*, — N.C. App. —, —, 678 S.E.2d 378, 384 (2009).

While defendant concedes that the two occurrences were factually similar, he contends this evidence was inadmissible under Rule 404(b) because the subsequent rape was not a "prior" act and was not temporally proximate to the current offenses, having occurred on 17 May 2002, nearly two and a half years after 30 January 2000, the date of the current offenses.

Our Supreme Court has discussed the impact of the temporal proximity of the other crime, wrong, or act in terms of its remoteness to the offense for which the defendant is charged:

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Remoteness for purposes of 404(b) must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered. For some 404(b) purposes, remoteness in time is critical to the relevance of the evidence for those purposes; but for other purposes, remoteness may not be as important. For example, . . . remoteness in time may be significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan; but remoteness is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident.

State v. Hipps, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999).

Here, after hearing the State's offer of proof and the arguments of counsel, the trial court ruled the evidence was admissible under Rule 404(b) as proof of the identification, intent, and *modus operandi* of defendant. The trial court expressly limited the admission of the evidence of the subsequent rape in instructions to the jury both before the tender of the evidence and in its final mandate to the jury immediately prior to their deliberations. As the evidence of the subsequent rape was admitted in part to show intent and *modus operandi* of defendant, remoteness in time of the second act is less important to its admissibility. *Id.*

As defendant concedes, this Court has upheld the admission of evidence under Rule 404(b) where the crimes, wrongs, or acts occurred after the offenses for which a defendant was on trial. *State v. Hutchinson*, 139 N.C. App. 132, 136, 532 S.E.2d 569, 572 (2000) (holding "the trial court properly admitted evidence of defendant's subsequent conduct in determining whether he possessed the intent and motive for the first degree burglary charge"). Indeed, under the plain language of the rule, there is no requirement that the crimes, wrongs, or acts occur prior to the charged offenses, only that they are "other" crimes, wrongs, or acts. *Id.*

Further, the nearly two-and-a-half-year span between the offenses is not so long as to affect the admissibility of the evidence, but rather goes to the weight of the evidence. *State v. Beckham*, 145 N.C. App. 119, 122, 550 S.E.2d 231, 235 (2001) (holding, as to the admissibility of prior bad acts that allegedly took place fourteen and twelve years before the acts alleged in that case, that "the lapse of time between the defendant's sexual acts . . . goes to the weight of the evidence, not to its admissibility"); *see also State v. Love*, 152 N.C. App.

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608, 613, 568 S.E.2d 320, 324 (2002) (“[O]ur Courts have permitted testimony of prior acts of sexual misconduct which occurred greater than seven to twelve years earlier.”), *disc. review denied*, 357 N.C. 168, 581 S.E.2d 66 (2003). Accordingly, the trial court did not err in admitting the evidence of the subsequent rape under Rule 404(b) because the subsequent rape was sufficiently temporally proximate to the charged offenses. These assignments of error are overruled. Defendant’s remaining assignments of error, set forth in the record on appeal, but not argued in his brief to this Court, are deemed abandoned. N.C.R. App. P. 28(b)(6) (2009) (amended Oct. 1, 2009).

No error.

Judges ROBERT C. HUNTER and BRYANT concur.

STATE OF NORTH CAROLINA v. THOMAS E. WRIGHT

No. COA08-1392

(Filed 3 November 2009)

1. Criminal Law— pretrial publicity—continuance denied

The trial court did not err by denying defendant’s motion for a continuance due to pretrial publicity where defendant neither presented evidence to support the motion nor asked the trial court to take judicial notice of any publicity, and all of the jurors stated that they had not heard about the case or could put aside what they had heard or read.

2. Evidence— character—obtaining property by false pretenses—campaign finance activities—probative of fact other than character

The trial court did not abuse its discretion in a prosecution for obtaining property by false pretenses by admitting testimony about campaign finance activities that was necessary to show how some of the charges were initiated and was probative of a fact other than the character of defendant.

3. Appeal and Error— preservation of issues—constitutional issue—evidence not objected to

A constitutional issue regarding testimony which was not objected to at trial was not preserved for appellate review.

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4. Indictment and Information— answer to jury question—no inconsistency with indictment

There was no inconsistency between the indictment and the trial court's answer to a jury question about a bank loan in a prosecution for obtaining property by false pretenses.

5. Appeal and Error— preservation of issues—lack of supporting authority—argument abandoned

An argument that was not supported by the case cited was deemed abandoned.

6. False Pretense— bank loan—availability of grant funds

The trial court did not err by not dismissing one charge of obtaining property by false pretenses with a loan where there was substantial evidence for the jury to infer that the bank relied on a letter falsely representing that grant funds were available in disbursing funds for the loan.

Appeal by defendant from judgments entered 7 April 2008 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 21 May 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander McC. Peters, for the State.

Douglas S. Harris, for defendant-appellant.

CALABRIA, Judge.

Thomas E. Wright ("defendant") appeals judgments entered upon jury verdicts finding him guilty of three counts of obtaining property by false pretenses. We find no error.

I. Background

Defendant was a member of the North Carolina House of Representatives and the president of The Community's Health Foundation, Inc. ("the Foundation"). In the spring of 2002, defendant approached Ronnie Burbank ("Burbank"), a commercial lender with Coastal Federal Bank, and requested a loan to purchase property at 926 North 4th Street in Wilmington, North Carolina for the Foundation. Defendant represented to Burbank that the loan would be repaid through government grant funds.

Five-and-a-half years later, on 10 December 2007, defendant was indicted for six separate offenses, including, *inter alia*, four counts

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of obtaining property by false pretenses. Defendant's cases were scheduled for trial on 3 March 2008. On 7 February 2008, defendant filed a Motion to Continue Trial Date and Extend the Discovery Period. The trial court granted the motion and defendant's cases were rescheduled for trial on 31 March 2008.

On 20 March 2008, defendant was removed from the North Carolina House of Representatives. Defendant's counsel stated the removal was the lead news story on all local television stations and "a number of top legislators pronounced defendant guilty of the criminal charges against him."

On 28 March 2008, defendant made another Motion to Continue that was denied by the trial court. Beginning on 31 March 2008, defendant was tried in Wake County Superior Court on four counts of obtaining property by false pretenses. The State presented evidence that defendant contacted Torlen Wade ("Wade"), former acting director of the North Carolina Department of Health and Human Services' Office of Research, Demonstrations, and Rural Health Development, regarding funds needed to secure a building for an African-American history museum that would also house the Foundation. Wade testified he told defendant he could not fund the history project, but could support the health project if defendant went through the appropriate grant process. Defendant told Wade he did not really need the money, he just needed a letter to give to the bank. Subsequently, Wade provided the letter.

Burbank internally approved a loan in the amount of \$150,000 to the Foundation on 5 March 2002, relying on defendant's representations that the source of repayment would primarily be the funds obtained from state and federal grants. Wade did not write his letter until 15 March 2002, and Burbank received the letter shortly thereafter. The loan closed on 5 April 2002. Burbank testified he initially relied on the defendant's representations and Wade's letter to approve and later to renew and extend the time for repayment of the loan.

On 14 November 2003, defendant contacted AstraZeneca Pharmaceuticals ("AstraZeneca") and requested a donation of \$1,500 to the Foundation for educational initiatives and projects. Brian Shank ("Shank"), a lobbyist for AstraZeneca, recommended a \$2,400 contribution from AstraZeneca to the Foundation. Agent Kanawa Perry ("Agent Perry") with the North Carolina State Bureau of Investigation testified that defendant told him he deposited the

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Foundation's check into his personal bank account. Shank testified he would not have recommended the contribution to the Foundation if he had known the funds would not have gone to the Foundation.

On 6 February 2004, defendant requested a contribution from Anheuser-Busch Companies, Inc. ("Anheuser-Busch") for the Foundation. Lewis McKinney ("McKinney"), regional director for government affairs with Anheuser-Busch, testified he recommended a \$5000 contribution from Anheuser-Busch to the Foundation. Anheuser-Busch sent defendant a \$5000 check on 5 March 2004. Defendant told Agent Perry he deposited the funds in his personal bank account. McKinney testified it was his intent in recommending the contribution that it be used for the Foundation and not deposited into defendant's private account.

At the close of the State's evidence, defendant made a motion to dismiss the charge of obtaining \$150,000 by false pretenses from Coastal Federal Bank. The trial court denied this motion. Defendant then renewed his motion to dismiss the same charge at the close of all the evidence, and the trial court again denied the motion.

The jury returned verdicts of guilty to three charges of obtaining property by false pretenses: (1) obtaining \$150,000 from Coastal Federal Bank; (2) obtaining \$2400 from AstraZeneca; and (3) obtaining \$5000 from Anheuser-Busch. Defendant was found not guilty on the remaining charge of obtaining \$1500 from AT&T Corporation. The trial court sentenced defendant to two consecutive active sentences of a minimum term of six months to a maximum term of eight months. Defendant also received an active sentence of a minimum term of fifty-eight months to a maximum term of seventy-nine months that was to run at the expiration of the first two sentences. All sentences were to be served in the North Carolina Department of Correction. Defendant appeals.

II. Motion to Continue

[1] Defendant argues that the trial court erred by denying his Motion to Continue. Defendant contends that the extreme publicity in Wake County resulting from defendant's removal from the North Carolina House of Representatives, eleven days prior to the commencement of the trial, irreparably tainted the jury pool. We disagree.

Normally, the review of a denial of a motion for continuance is restricted to whether the trial court abused its discretion and the denial will not be disturbed absent a showing of abuse of that discre-

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tion. *State v. Barnard*, 346 N.C. 95, 104, 484 S.E.2d 382, 387 (1997). However, when the motion raises a constitutional issue, the trial court's action is a reviewable question of law. *Id.* "The denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial only upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error." *Id.* (quoting *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982)).

Defendant filed a Motion to Continue on the grounds that pretrial publicity had the potential to prejudice the jury pool and deprive defendant of a fair trial, in violation of defendant's due process rights. "Due process requires that the accused receive a trial by an impartial jury free from outside influences." *State v. Boykin*, 291 N.C. 264, 269, 229 S.E.2d 914, 917 (1976) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362, 16 L. Ed. 2d 600, 620 (1966)). "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *State v. Richardson*, 308 N.C. 470, 478, 302 S.E.2d 799, 804 (1983) (quoting *Sheppard*, 384 U.S. at 363, 16 L. Ed. 2d at 620). The burden is on the defendant to show "so great a prejudice . . . that he cannot obtain a fair and impartial trial." *Richardson*, 308 N.C. at 478, 302 S.E.2d at 804 (quoting *Boykin*, 291 N.C. at 269, 229 S.E.2d at 917-18).

In the instant case, defendant did not present any evidence to the trial court in support of his Motion to Continue and did not ask the trial court to take judicial notice of any pretrial publicity. The record before this Court is also bereft of any evidence by which defendant's claims regarding pretrial publicity could be evaluated. Without any evidence of the nature of the pretrial publicity complained about by defendant, it is impossible to determine whether defendant was prejudiced or whether the trial court erred by denying the Motion to Continue.

Even assuming, *arguendo*, that there was sufficient evidence of pretrial publicity in the record, the transcript of the *voir dire* proceedings makes it clear that this publicity did not improperly influence the jury. All of the jurors on defendant's jury explicitly stated they either had not heard about defendant's case or that they could put aside what they heard on television or read in newspapers and could determine defendant's guilt or innocence based on the evidence they heard at trial. Under these circumstances, the trial court cannot be said to have erred by denying defendant's Motion to Continue. *See*

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Richardson, 308 N.C. at 481, 302 S.E.2d at 805; *State v. Johnson*, 317 N.C. 343, 369-72, 346 S.E.2d 596, 610-12 (1986).

III. Testimony of Kim Strach

[2] Defendant argues that the trial court erred by allowing testimony by Kim Strach (“Ms. Strach”), Deputy Director of the North Carolina State Board of Elections (“the SBE”). Ms. Strach testified the SBE received a complaint in December 2006 alleging the “Committee to Elect Thomas Wright” violated campaign finance regulations by failing to timely report receipt of some contributions that it had received. The SBE subpoenaed defendant’s bank account records and compared them to campaign finance reports. The SBE discovered some campaign contributions that were deposited had not been disclosed. Based on this information, the SBE decided to audit the accounts. The SBE examined every check and discovered that between 2000 and 2006, 58% of defendant’s campaign contributions were deposited into his personal account. During the audit, the SBE noticed checks from AstraZeneca and Anheuser-Busch deposited in defendant’s personal account. Ms. Strach further testified about the amount of defendant’s campaign expenditures and contributions that had not been disclosed.

A. Rule 404(b)

Defendant argues that Ms. Strach’s testimony was inadmissible under N.C. Gen. Stat. § 8C-1, Rules 403 and 404(b)(2007). “We review a trial court’s determination to admit evidence under N.C. R. Evid. 404(b) and 403, for an abuse of discretion.” *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 (2006) (citations omitted). Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007). Rule 404(b) “state[s] a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d

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48, 54 (1990). “Rule 404(b) evidence, however, should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused.” *State v. al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002).

Ms. Strach’s testimony related directly to obstruction of justice charges against defendant that were not joined with the four counts of obtaining property by false pretenses for defendant’s trial. However, Ms. Strach’s testimony was necessary for the State to show how some of the charges in the instant case were initiated. Ms. Strach testified that the improper transfers of the contributions by AstraZeneca and Anheuser-Busch into defendant’s personal accounts were first discovered after audits were performed. Because Ms. Strach’s testimony was probative of a fact other than the character of the defendant, the trial court did not abuse its discretion in allowing the testimony.

B. Due Process

[3] Defendant argues that allowing evidence about defendant’s campaign expenditures was equivalent to trying defendant for the obstruction of justice charge which was severed before trial began, in violation of defendant’s right to due process. Defendant contends he was deprived of effective assistance of counsel because counsel did not have adequate time to prepare to address the obstruction of justice charge.

At trial, defendant did not object to Ms. Strach’s testimony on this basis, and he has therefore failed to preserve his constitutional arguments for appellate review. It is well settled that constitutional issues cannot be raised for the first time on appeal. *State v. Anthony*, 354 N.C. 372, 389, 555 S.E.2d 557, 571 (2001). This assignment of error is overruled.

IV. Trial Court’s Response to Jury Questions

[4] After the jury retired to deliberate, the jury presented a question to the trial court regarding the charges on Count Number 4, obtaining the \$150,000 loan from Coastal Federal Bank by false pretenses (“Count Four”). The jury asked two questions: (1) whether renewal and extension of bank loans mean the same thing as “obtained a loan” and (2) does the representation to the bank only include a copy of the letter to the bank or does it include any oral and/or verbal representations? After hearing from counsel, the trial court instructed the jury that renewal and extension of bank loans mean the same thing as

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“obtained a loan” and that the representation to the bank “only includes a copy of the letter.”

A. Consistency of Trial Court’s Answer with Indictment

Defendant argues the trial court erred in its answer to the jury’s first question. Defendant contends that the trial court’s answer was inconsistent with both the indictment and the trial court’s original charge to the jury. An inquiry into whether a variance between a bill of indictment and a jury charge was prejudicial error and therefore fatal requires an examination of the purposes of an indictment, which are: “(1) to identify the crime with which defendant is charged, (2) to protect defendant against being charged twice for the same offense, (3) to provide defendant with a basis on which to prepare a defense, and (4) to guide the court in sentencing.” *State v. Hines*, 166 N.C. App. 202, 206-07, 600 S.E.2d 891, 895 (2004) (citation omitted).

Here, the “variance” did not result in failure to identify the crime charged and defendant was not charged twice for the same offense. For his actions procuring the loan, defendant was only charged on one count of obtaining property by false pretenses. Defendant had a basis for defense and the indictment put defendant on notice it was considering defendant’s use of the letter from Wade during the time frame of 13 March 2002 until June 2004. There was no inconsistency between the trial court’s answer to the jury questions and the indictment.

Defendant also argues the judge’s answers violate N.C. Gen. Stat. § 15A-924(a)(2), which reads: “(a) A criminal pleading must contain: . . . (2) A separate count addressed to each offense charged, but allegations in one count may be incorporated by reference in another count.” N.C. Gen. Stat. § 15A-924(a)(2) (2007). Defendant was charged with only one offense in Count Four and convicted of one offense in Count Four. This assignment of error is overruled.

B. Trial Court’s Answer

[5] Defendant argues the trial court’s answer was manifestly unsupported by reason because the loan was internally approved before the letter was written and the recipients had already received the money. The only case defendant cites in support of this argument, *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985), merely states the standard of review for abuse of discretion. This case does not support defendant’s position. As such, we deem this assignment of error abandoned pursuant to N.C.R. App. P. 28(b)(6) (2008).

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V. Motion to Dismiss Count Four

[6] Defendant argues that the trial court erred by denying defendant's motion to dismiss Count Four. "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). To sustain a conviction for obtaining property by false pretenses, the State must establish: "(1)[A] false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person." *State v. Saunders*, 126 N.C. App. 524, 528, 485 S.E.2d 853, 855-56 (1997). In the instant case, the State presented substantial evidence of each element of the offense. The State's evidence established that defendant used Wade's letter to falsely represent that he had obtained grant funds in order to obtain a thing of value, the loan. Defendant's argument focuses on the fact that Wade's letter was written on 15 March 2002, ten days after the date Burbank internally approved the loan. However, the loan was not disbursed until April 2002, and Burbank testified he relied on the letter in closing the loan. There is substantial evidence for a jury to infer the bank relied on the letter in disbursing the funds for the loan. The trial court properly denied defendant's motion to dismiss.

VI. Conclusion

Defendant has failed to bring forth any argument regarding his remaining assignment of error. As such, we deem this assignment of error abandoned pursuant to N.C.R. App. P. 28(b)(6) (2008).

Defendant received a fair trial, free from error.

No error.

Judges BRYANT and ELMORE concur.

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EAGLES NEST, A JOHN TURCHIN COMPANY, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY (F/K/A T & A INVESTMENTS II, LLC, AS SUCCESSOR IN INTEREST TO T & A HUNTING AND FISHING CLUB, INC., A NORTH CAROLINA CORPORATION, PLAINTIFF v. JAMES H. RIDINGER (A/K/A “JR” RIDINGER) AND WIFE, LOREN RIDINGER AND MIRACLE NC CONSTRUCTION, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, DEFENDANTS

JAMES RIDINGER AND LOREN RIDINGER, PLAINTIFFS v. EAGLES NEST, A JOHN TURCHIN COMPANY, LLC, T&A HUNTING AND FISHING CLUB, INC, AND JOHN TURCHIN, DEFENDANTS

No. COA09-116

(Filed 3 November 2009)

Contracts— declaratory judgments—cash investment in real estate development—interpretation of contract terms

In a declaratory judgment action in which the Ridingers invested \$1,000,000 with plaintiff (Turchin) in return for 40 acres in a new development and only 30 acres were transferred, the trial court properly required the payment of \$250,000 to the Ridingers. The trial court correctly interpreted the contract between the parties; investing cash in a business does not guarantee a profit for the investor.

Appeal by defendants James H. Ridinger, Loren Ridinger, and Miracle NC Construction, LLC, from judgment entered 24 October 2008 by Judge James L. Baker, Jr., in Avery County Superior Court. Heard in the Court of Appeals 20 August 2009.

Vetro & Lundy, P.C., by Michael Vetro and M. Shaun Lundy, for plaintiff Eagles Nest, a John Turchin Company, LLC.

Womble Carlyle Sandridge & Rice, a Professional Limited Liability Company, by Pressly M. Millen and Sean E. Andrussier, for defendants James H. Ridinger, Loren Ridinger, and Miracle NC Construction, LLC.

ELMORE, Judge.

James H. Ridinger, Loren Ridinger, and Miracle NC Construction, LLC (defendants or the Ridingers), appeal a declaratory judgment in favor of Eagles Nest, a John Turchin Company, LLC (plaintiff or Turchin).¹ For the reasons stated below, we affirm the judgment of the trial court.

1. In addition to defending its judgment below, Turchin argues that the trial court should have dismissed the Ridingers' other claims. Although Turchin fashioned this

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Background

On 14 May 2003, the parties entered into a promissory note drafted by Turchin. The note, in relevant part, reads as follows:

FOR VALUE RECEIVED, the undersigned (the “Maker”), promises to pay JR. RIDINGER and LAUREN [*sic*] RIDINGER, (the “Holder”) the principal sum of *ONE MILLION AND NO/100 DOLLARS (\$1,000,000.00)* or so much thereof as has been advanced hereunder, in the following manner:

Maker shall convey on or before when completed, to Holder as repayment, approximately 40 acres of undeveloped vacant land (the “Property”) located within the 300 acre development known as T&A Hunting and Fishing Club (the “Development”), located in Banner Elk, North Carolina. . . .

In the event that the Holder and Maker are unable to agree upon the specific property within the Development to be conveyed, Holder at their option may elect to receive repayment in lawful money of the United State [*sic*] of America, however, such payment shall not be due until completed or June 2005.

This note shall construed [*sic*] and enforced according to the laws of the State of Florida.

* * *

If default be made in the payment of any of the sums mentioned herein in the performance of any of the agreements contained herein, then the entire principal sum shall be at the option of the Holder hereof become at once due and collectible without notice, time being of the essence; and said principal sum shall both bear interest from such time until paid at the highest rate allowable under the laws of the State of Florida. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default.

Pursuant to this promissory note, the Ridingers paid \$1,000,000.00 to Turchin. On 30 June 2005, a North Carolina General Warranty Deed was filed in Avery County that transferred an approximately ten-acre lot in the development from Turchin to defendant Miracle NC Construction, LLC. A second deed was filed on 31 Octo-

issue as a cross-assignment of error, it offered no authority or substantive arguments to support it. Accordingly, we do not address it. *See* N.C.R. App. P. 28(b)(6) (2008).

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ber 2005 and a third on 5 January 2007. Combined, these three deeds transferred a total of approximately thirty acres from Turchin to defendant Miracle NC Construction, LLC.

On 6 November 2007, Turchin filed a verified complaint for declaratory judgment asking the trial court to “construe and declare the respective rights and obligations of the parties as it relates to the [promissory n]ote and the satisfaction of the terms thereof pursuant to N.C. Gen. Stat. § 1-253, *et seq.*” [R. 8] Specifically, Turchin asked the trial court, (1) “Whether Plaintiff may satisfy the Note by way of payment to Defendants in the amount of Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00)” or, in the alternative, (2) “Whether Plaintiff may satisfy the Note by way of conveying to Defendants one of the three (3) remaining platted ten (10) acre parcels of real property in the Development Parcel.”

On 20 December 2007, the Ridingers responded with their own complaint, which expounded upon the business deal that they had entered into with plaintiff and the trouble that followed. According to the complaint, Turchin and the Ridingers knew each other socially before 2003, but, sometime during 2003, Turchin informed the Ridingers that he planned to develop Eagles Nest in Avery County but lacked adequate capital to do so. The Ridingers agreed to invest \$1,000,000.00 in the development project and executed the promissory note drafted by Turchin. According to the complaint, “the Promissory Note makes clear the intentions of the Ridingers that that [*sic*] their investment objectives would be realized by virtue of Turchin’s acumen as a developer. As such, the Ridingers and Turchin were co-venturers.” However, the complaint alleges that after the Ridingers received the first thirty acres of property, Turchin

impeded the efforts of the Ridingers to obtain conveyance of the balance of the Property. Among other things, Turchin has taken the position that the Ridingers may not obtain any property on which improvements have been made and that the Ridingers may not obtain any property which has been subdivided into parcels of less than ten acres. [Turchin has] also conveyed and otherwise encumbered portions of the property in a manner which has damaged the Ridingers by purportedly diminishing the amount of property from which they are entitled to chose [*sic*] and the terms upon which they can exercise their choice.

The Ridingers alleged breach of contract, breach of fiduciary duty, and violation of the North Carolina Unfair and Deceptive Practices

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Act. The Ridingers received a *lis pendens* on three lots in the development totaling approximately ten acres.

The cases were consolidated on 25 February 2008. Shortly thereafter, the Ridingers filed their answer to Turchin's complaint for declaratory judgment. They denied most of the allegations and asserted the following affirmative defenses: (1) the complaint failed to state a claim; (2) every claim for relief is barred, in whole or in part, by the doctrines of estoppel, waiver, or laches; and (3) the claims are barred by the Statute of Frauds. The Ridingers asked the trial court to dismiss Turchin's complaint on the merits and sought costs and attorneys' fees.

Over the course of the following six months, both parties moved for summary judgment. The trial court heard arguments from counsel in October 2008 and reviewed the contents of the file, the briefs, the proffered case law, the verified pleadings, and the deposition transcripts of James Ridinger and John Turchin. In its order granting summary judgment to Turchin, the trial court made the following relevant findings of fact:

6. That the Court acknowledges the language indicating that this *Note* is to be construed according to the laws of the State of Florida; however, no statutory evidence from the State of Florida has been produced that would suggest that Florida law provides for a different interpretation of the *Note* than the State of North Carolina. Accordingly, it is appropriate to interpret the document from its plain meaning, whether in the State of North Carolina or in the State of Florida.

7. That the *Note* is, in effect, a loan to the Eagles Nest Parties from the Ridinger parties in the original principal amount of One Million Dollars (\$1,000,000.00) which was to be repaid in one (1) of two (2) ways: either (a) the repayment to the Ridinger Parties in the principal amount of One Million Dollars (\$1,000,000.00), or the portion thereof not yet repaid; or, in the alternative, (b) if the Ridinger Parties and the Eagles Nest Parties were able to agree on the identification of Forty (40) acres of real property, which is not described, but which the evidence indicates as being a part of a 258.77 acre tract as owned by the Eagles Nest Parties on the date of the making of the *Note*.

* * *

10. That the question that comes to the Court is the paragraph that reads: "In the event that the Holder and the Maker are unable

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to agree upon the specific property within the Development to be conveyed, Holder at their option may elect to receive payment of lawful money of the United State (sic) of America, however, such payment shall not be due until completed or June 2005.”

11. That regardless of the meaning of “completed” or “June 2005,” the Parties are unable to agree as to additional acres that the Eagles Nest Parties are willing to convey and that the Ridinger Parties are willing to accept, which fact is supported by the documentary evidence and deposition transcripts, and by the pleadings; specifically, the Ridinger Parties *Answer* at paragraph 26 states that “the parties have been unable to agree.”

12. That in the event the Parties are unable to agree on land, the Holder of the *Note* may receive payment in lawful money.

13. The exchange of land is no longer an option and, therefore, the Ridinger Parties are entitled to receive payment in lawful money.

14. That it has been pointed out to the Court that the *Note* does not provide for the payment of interest and that the *Note* is not a type of agreement that someone might enter into; however, the face of the document reflects the terms of the agreement into which the Parties entered.

In its decree, the court stated that the Ridingers were “entitled to receive final payment in the amount of” \$250,000 “and that said amount is due to the Ridinger Parties when they so request it.”

Argument

The Ridingers argue that the trial court misconstrued the promissory note and that it should have concluded that the Ridingers’ recourse was not “limited to a refund of \$250,000 at Mr. Turchin’s election” and instead the note could also reasonably “be construed to mean that the Ridingers may elect to receive *the value* of a 10-acre lot.” We disagree.

“The standard of review for summary judgment is *de novo*.” *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). “Summary judgment is appropriate if ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a mat-

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ter of law.’ ” *Id.* at 523-24, 649 S.E.2d at 385 (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005)).

First, we point out that the refund of \$250,000 is available at the *Ridingers*’ election, not Turchin’s. The promissory note specifies that the Holder, at its option, may elect payment. The promissory note defines the Holder as the *Ridingers* and Miracle NC Construction, LLC. The summary judgment order also specifies that the *Ridingers* may elect to receive the refund.²

The *Ridingers* point us to a Florida case, *Gleason v. Leadership Housing, Inc.*, as support for interpreting “repayment” to include the value of a ten-acre lot. 327 So.2d 101 (Fla. Dist. Ct. App. 1976). In *Gleason*, a Florida developer had contracted with Jackie Gleason, the entertainer, to publicize a new development, design a golf course for the development, and try to have a golf tournament held there. *Id.* at 102. In return, Gleason would receive a monthly salary, the “privilege of leasing a residence,” and “the right to purchase a portion of the [development] at a designated ‘bargain’ price. . . . The selection of the land [would] be subject to the approval of both parties.” *Id.* The contract also listed certain selection criteria for the parcel. *Id.* Gleason performed his side of the bargain, but the developer parried Gleason’s repeated attempts to arrange the selection of a parcel and a closing date by acknowledging the obligation but refusing to commit to further action. *Id.* at 103. After two years of refusing Gleason’s requests, the developer proposed a tract in January 1972. *Id.* However, the tract did not meet the selection criteria in the contract and Gleason rejected the offer. *Id.* The developer offered a second parcel in February 1972, which similarly failed to meet the selection criteria in the contract and was rejected by Gleason. *Id.* The developer offered no other parcels to Gleason. *Id.* Gleason sued the developer for specific performance of the contract, but later amended the complaint to seek damages. *Id.* The developer countered that the contract was invalid. *Id.* The trial court granted final judgment in favor of the developer after concluding that the agreement violated the Statute of Frauds and, thus, could not support a claim for damages. *Id.* at 103.

2. Although the promissory note does not specify an interest rate, it does state that, in the event of a default “in the payment of any of the sums mentioned herein,” the “entire principal sum shall be at the option of” the *Ridingers* “at once due and collectible without notice” and “said principal sum shall both bear interest from such time until paid at the highest rate allowable under the laws of the State of Florida.” The trial court did not address this acceleration clause nor do the *Ridingers* address it in their brief. However, this clause might offer the *Ridingers* some relief as it appears that Turchin may have been in default since at least June 2005.

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On appeal, the Court of Appeals of Florida, Fourth District, reversed the trial court's judgment. *Id.* at 105. The appellate court "assum[ed] for the purpose of [its] decision that the agreement was, in fact, in violation of the Statute of Frauds" and held that the developer was "estopped to contest the validity of the agreement under the doctrine of equitable estoppel." *Id.* at 104. The court explained that Gleason was prejudiced by the developer taking "a position completely inconsistent with that taken by it prior to litigation, and upon which Gleason relied" to his detriment. *Id.* at 104. Had the developer not "continuously over a three-year period led Gleason to believe that the contract was valid and that land meeting the contract standards would be conveyed to him," Gleason might have accepted one of the parcels that he rejected in 1972 because "any of the property was worth substantially more than the [bargain] price called for by the contract." *Id.* at 104-05. The court noted that whether the developer

got that much value from the use of Gleason's name and his services up to the time the contract was terminated is not the issue; rather, it is simply that in exchange for receiving such benefit[, the developer] agreed to sell at a bargain price 16.8 acres of land so that Gleason could ultimately realize a gain therefrom.

Id. at 105. Because the only relief available to him was an award of damages, the court concluded that the "proper measure" of damages should be the value of the last parcel that the developer offered to Gleason in February 1972, as of the date that it was offered, minus the "bargain price" stipulated in the contract, plus interest from the offer date until the judgment date. *Id.*

Although factually similar in several ways, a critical difference between *Gleason* and the case at hand is this: The contract in *Gleason* did not include a provision for how repayment would be calculated if the parties could not agree on a parcel. The *Gleason* court even commented that whether the parties received the value that they had anticipated was irrelevant; the contract boiled down to an exchange of services for land. Here, the contract boils down to an exchange of cash for land. However, the contract also clearly states that, if the parties cannot settle on the land, the Ridingers may choose a refund of their investment. The Ridingers have, apparently, not chosen such a refund. Like the court in *Gleason*, we cannot say whether the Ridingers will receive the payoff that they had hoped for or whether the parties were unwise to enter into this agreement.

IN RE S.R.G.

[200 N.C. App. 594 (2009)]

We observe that investing cash in a business does not guarantee a profit for the investor. It appears that the Ridingers realized a profit on their investment with respect to the three parcels they were deeded in the development; whether their profit was diminished by unethical or illegal acts by Turchin is not a question currently before this Court and remains to be determined at the trial level. The only question before this Court now is whether the trial court improperly interpreted the contract between the parties. We hold that it did not. Accordingly, the judgment of the trial court is affirmed.

Affirmed.

Judges BRYANT and BEASLEY concur.

IN THE MATTER OF: S.R.G.

No. COA09-789

(Filed 3 November 2009)

Termination of Parental Rights— remand—new ground for termination—not allowed

The trial court erred by terminating respondent's parental rights after remand on a new ground where that new ground had originally been alleged but not adjudicated and plaintiff had not cross-assigned error to the failure to adjudicate on the alternate grounds. The trial court had the authority to continue to exercise supervision of the case and DSS can file a new petition based on new grounds.

Appeal by respondent-mother from order entered 29 April 2009 by Judge Thomas G. Taylor in Gaston County District Court. Heard in the Court of Appeals 28 September 2009.

Thomas B. Kakassy, P.A., by Thomas B. Kakassy, for petitioner-appellee Gaston County Department of Social Services.

Wyrick Robbins Yates & Ponton, LLP, by Tobias S. Hampson, for respondent-appellant mother.

Pamela Newell Williams for guardian ad litem.

IN RE S.R.G.

[200 N.C. App. 594 (2009)]

ELMORE, Judge.

Respondent-mother appeals from the district court's order on remand terminating her parental rights to her daughter, S.R.G. After careful review, we reverse the decision of the Gaston County District Court.

The Gaston County Department of Social Services (DSS) became involved in the instant case after S.R.G. tested positive for cocaine and benzodiazepines at her birth in March 2006. Respondent-mother also tested positive for drugs, and she admitted to using drugs during the pregnancy. Despite DSS's attempts to work with respondent-mother, her substance abuse problems continued. DSS allowed a kinship placement, but it did not work out, and, on 16 March 2007, DSS filed a juvenile petition alleging neglect and dependency. DSS was granted non-secure custody the same day and S.R.G. was placed in foster care.

The trial court adjudicated S.R.G. neglected on 24 July 2007 after respondent-mother admitted the underlying facts regarding her substance abuse. In its order filed 15 August 2007, the trial court sanctioned a permanent plan of reunification and ordered respondent-mother to complete various goals designed to accomplish this end. The trial court authorized supervised visitation for respondent-mother once a week. Following the adjudication, respondent-mother made some progress on her case plan, but continued to have problems with substance abuse and other aspects of the plan requirements, and, therefore, failed to comply with all the plan requirements. Following a review hearing on 23 October 2007, the trial court sanctioned a concurrent plan of adoption and reunification based on respondent-mother's limited progress.

On 24 October 2007, DSS filed a petition for termination of respondent-mother's parental rights, alleging the following grounds: (1) neglect; (2) willful failure to pay a reasonable portion of the cost of care for the juvenile for the six-month period preceding the filing of the petition despite being physically and financially able to do so; and (3) willful abandonment for at least six months prior to the filing of the petition. Respondent-mother filed an answer denying the material allegations of the petition. In a subsequent review hearing, the trial court changed the permanent plan to one of adoption based on respondent-mother's noncompliance with her case plan and continued substance abuse.

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The termination hearing was held on 21 May 2008. In an order entered 28 May 2008, the trial court found as a basis for termination that respondent willfully abandoned S.R.G. in the six months preceding the filing of the termination petition. *See* N.C. Gen. Stat. § 7B-1111(a)(7) (2007). The court then considered various factors regarding the best interests of the juvenile, determined that termination was in the best interests of S.R.G., and ordered that respondent-mother's parental rights be terminated.

Respondent-mother appealed from the termination order, and, in an opinion filed 20 January 2009, we reversed the order of the trial court and remanded for further action consistent with our opinion. *In re S.R.G.*, — N.C. App. —, 671 S.E.2d 47 (2009). First, we recognized that respondent-mother's failure to make reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2) could not constitute grounds for termination because it was not alleged by DSS in the termination petition. *Id.* at —, 671 S.E.2d at 50-51. Next, we held that the trial court erred in finding grounds to terminate pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) because respondent-mother's actions during the relevant six-month period were insufficient to "demonstrate a purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to S.R.G." *Id.* at —, 671 S.E.2d at 53.

On remand, the trial court held a seven-minute hearing on 13 April 2009, but did not hear any new evidence. Relying on the findings of fact in its previous termination order, the court explained its decision, over the objection of respondent-mother:

[M]y intent is to rely on my earlier findings of fact noting that I may consider a prior adjudication of neglect, although I'm not bound by it, and [S.R.G.] was adjudicated neglected . . . in 2007 in this case. I do not intend to make any further findings of fact. . . . But based on those, I would make an independent finding whether the neglect existed at the time of the original hearing in May of 2008, and I will find that neglect still exists, that there is among other things her refusal to enroll in a residential drug-treatment facility, failure to make significant improvements in her lifestyle, that her lifestyle supports the probability of the repetition of the neglect that originally occurred, and that she by all counts could not pay support at the time of the hearing. . . . I therefore do not see the necessity for any further evidentiary hearing, and I will indeed find that the neglect existed at the time of the hearing, that its likelihood to continue was great, and that

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it's in the best interest of the child that [respondent-mother's parental rights] hereby are terminated.

By order entered 29 April 2009, the trial court terminated respondent-mother's parental rights, concluding that the ground of neglect existed to support termination and that termination was in the best interest of S.R.G. Respondent-mother appeals.

On appeal, respondent-mother contends that the trial court erred in terminating her parental rights to S.R.G. First, respondent-mother argues that, by adjudicating another ground for termination on remand, the trial court committed error by failing to follow this Court's mandate. Next, respondent-mother argues that the trial court erred in finding the existence of neglect as a ground for termination because the evidence was insufficient to support a finding of either neglect at the time of the hearing or a likelihood of continued neglect. Lastly, respondent-mother argues that the trial court erred at disposition. We agree with respondent-mother's first argument on appeal, that the trial court erred in adjudicating the existence of another ground for termination on remand. Therefore, we need not address the remainder of respondent-mother's arguments.

It is well established that, on remand from this Court, "[t]he general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure." *In re R.A.H.*, 182 N.C. App. 52, 57, 641 S.E.2d 404, 407 (2007) (quoting *Condellone v. Condellone*, 137 N.C. App. 547, 551, 528 S.E.2d 639, 642 (2000)). In the case at bar, this Court reversed the trial court's order finding grounds to terminate respondent-mother's parent rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) and remanded for further action consistent with our opinion. *S.R.G.*, — N.C. App. at —, 671 S.E.2d at 53. Although this mandate did not explicitly prohibit the trial court from holding a second termination hearing on remand, the law of the case doctrine greatly limited the trial court's ability to do so.

The law of the case doctrine applies to cases in which "a question before an appellate court has previously been answered on an earlier appeal in the same case[.]" *Wrenn v. Maria Parham Hosp., Inc.*, 135 N.C. App. 672, 678, 522 S.E.2d 789, 792 (1999) (emphasis omitted). In such a case, "the answer to the question given in the former appeal becomes 'the law of the case' for purposes of later appeals." *Id.* Our Supreme Court explained:

A decision of this Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on

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[200 N.C. App. 594 (2009)]

a subsequent appeal. *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974). “[O]ur mandate is binding upon [the trial court] and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered.” *D & W, Inc. v. Charlotte*, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966). “We have held judgments of Superior [C]ourt which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court . . . to be unauthorized and void.” *Collins v. Simms*, 257 N.C. 1, 8, 125 S.E.2d 298, 303 (1962).

Lea Co. v. N.C. Board of Transportation, 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989).

In a proceeding to terminate parental rights, the trial court “shall take evidence, find the facts, and *shall adjudicate the existence or nonexistence* of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent.” N.C. Gen. Stat. § 7B-1109(e) (2007) (emphasis added). Here, in the original termination hearing and order, the trial court adjudicated the existence of only one ground for termination, willful abandonment, even though DSS alleged a total of three grounds for termination. Based on the mandatory language of N.C. Gen. Stat. § 7B-1109(e), the consequence of such an adjudication is the nonexistence of the other two grounds alleged by DSS, which were neglect and willful failure to pay a reasonable portion of the cost of care for the juvenile. Moreover, the trial court did not have the discretion to develop one ground and ignore the other two, if all three grounds were supported by the evidence. A trial court is not permitted to exercise discretion on adjudication. *See In re Carr*, 116 N.C. App. 403, 407, 448 S.E.2d 299, 301-02 (1994) (holding that the trial court erred by exercising discretion in the adjudicatory stage of termination of parental rights proceeding). Accordingly, the trial court’s original order foreclosed the possibility of the existence of neglect or willful failure to pay a reasonable portion of the cost of care as grounds for termination.

In *S.R.G.*, we reversed the trial court’s order finding the existence of grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(7). *S.R.G.*, — N.C. App. at —, 671 S.E.2d at 53. Our decision reversing grounds for termination therefore became the law of the case. However, on remand, the trial court found that neglect existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) as grounds for termination. Such a finding was in error, based on the trial court’s previous

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[200 N.C. App. 594 (2009)]

failure to find such a ground. Furthermore, DSS failed in *S.R.G.* to cross-assign error to the trial court's failure to find the existence of neglect and willful failure to pay a reasonable portion of the cost of care as grounds for termination, which foreclosed the possibility of the trial court to terminate respondent-mother's parental rights on the alternative ground of neglect. *See Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 685 (2002) ("In the instant case, the additional arguments raised in plaintiff-appellee's brief, if sustained, would provide an alternative basis for upholding the trial court's determination[.] . . . However, plaintiff failed to cross-assign error pursuant to Rule 10(d) to the trial court's failure to render judgment on these *alternative* grounds. Therefore, plaintiff has not properly preserved for appellate review these alternative grounds."). If DSS had cross-assigned error to this issue, if sustained, the trial court would have been provided with an alternative basis for the termination of respondent-mother's parental rights, and a new hearing would have been appropriate on remand. However, DSS did not preserve this issue and was barred from re-litigating it on remand. *See Naddeo v. Allstate Ins. Co.*, 139 N.C. App. 311, 320, 533 S.E.2d 501, 507 (2000) (holding that, where appellant failed to challenge a finding on appeal, it was conclusive on appeal, became the law of the case, and foreclosed appellant from re-litigating the issue in any subsequent proceedings). Accordingly, the trial court had no authority to substitute the existence of a new ground on remand. It did, however, have authority to continue to exercise supervision of the case through the permanency planning and review processes provided for in Chapter 7B of our juvenile code.

Finally, we note that nothing in the juvenile code prevented DSS from filing a new petition to terminate respondent-mother's parental rights based on the existence of new grounds. A new petition, based on circumstances arising subsequent to the original termination hearing, would have constituted a new action, and would not have been barred by the doctrine of *res judicata*. *See In re I.J. & T.J.*, 186 N.C. App. 298, 301, 650 S.E.2d 671, 673 (2007) ("Since the trial court specifically based its order only upon facts which occurred after the filing of the first petition, there is not identity of issues between the first and second petitions and *res judicata* does not apply."). DSS, however, did not file a new petition. Instead, the trial court based its adjudication of neglect on the previous petition. Such a finding was in error and we therefore reverse the trial court's decision.

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[200 N.C. App. 600 (2009)]

Reversed.

Chief Judge MARTIN and Judge BEASLEY concur.

PROGRESS ENERGY CAROLINAS, INC., PETITIONER V.
WILLIAM HOWELL STRICKLAND, RESPONDENT

No. COA09-170

(Filed 3 November 2009)

1. Eminent Domain— law of the case—power line interfering with airstrip—second appeal

The law of the case doctrine applied in a condemnation action involving a power line that affected two airstrips, and the trial court properly instructed the jury using specific language from the prior appellate opinion.

2. Eminent Domain— damages trial—instructions—use of land

The trial court in an eminent domain proceeding did not improperly focus the jury on one use of the property and take away the jury's fact finding function of determining the highest and best use of the property.

Appeal by petitioner from judgment filed 8 September 2008 by Judge Cressie Thigpen in Columbus County Superior Court. Heard in the Court of Appeals 2 September 2009.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster and Jackson Wyatt Moore, Jr., for petitioner-appellant.

Vandeventer Black LLP, by David P. Ferrell and Norman W. Shearin, Jr., for respondent-appellee.

STEELMAN, Judge.

Where the trial court's instruction to the jury was based upon law of the case and left the determination of what constituted the highest and best use of the property to the jury, the instruction was not error.

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[200 N.C. App. 600 (2009)]

I. Factual and Procedural Background

On 2 February 2005, Progress Energy Carolinas, Inc. (PEC) filed a petition for condemnation in Columbus County Superior Court seeking to acquire an easement to construct a 230 kilovolt power line across a tract of land owned by William Strickland (Strickland). The condemnation sought to widen a previous seventy (70) foot easement of PEC to one hundred fifty-five (155) feet. Strickland contested the condemnation because the proposed power line would interfere with the use of two airstrips on his property. On 5 July 2005, the trial court held an evidentiary hearing on all issues, except the amount of just compensation (the issues hearing). On 1 September 2005, the trial court held that PEC had the authority to condemn the easement, and remanded the matter to the Columbus County Clerk of Court for further proceedings. Strickland appealed to this Court.

In *Progress Energy Carolinas, Inc. v. Strickland*, 181 N.C. App. 610, 640 S.E.2d 856 (2007), this Court affirmed the trial court's order (the first appeal). We addressed three issues: (1) whether the trial court erred in finding that Strickland's garden was not affected by the easement; (2) "whether the petition sufficiently described the extent of the easement to be condemned and whether petitioner has the legal authority to condemn the rights described in the petition;" and (3) whether petitioner can exercise the power of eminent domain over Strickland's two airstrips when the eminent domain statutes conflict with statutes governing the obstruction of private airports and runways. Judge Tyson dissented in part, and Strickland appealed to the Supreme Court.

Ultimately, this appeal was resolved by the parties entering into a settlement agreement. On 24 May 2007, the Clerk of Superior Court of Columbus County entered a final order agreed to by the parties.

A jury trial was held pursuant to N.C. Gen. Stat. § 40A-64 to determine the fair market value of the easement on Strickland's land. Both parties presented expert testimony. Strickland presented the expert testimony of Dennis Gruelle (Gruelle), a real estate appraiser. Gruelle testified that the two airstrips constituted the highest and best use of Strickland's property, and the value of the easement was \$790,000. PEC presented the expert testimony of George E. Knight, Jr. (Knight), also a real estate appraiser. Knight testified that the highest and best use of Strickland's property was as agricultural land, and the value of the easement was \$4,400.

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At the close of evidence, the trial court instructed the jury on how to determine the fair market value of Strickland's property before and after the taking. Strickland requested that the trial court modify the pattern jury instructions to conform with this Court's opinion in the first appeal. The trial court instructed the jury as follows:

In this case the easement affects one or both airstrips. To the extent the power lines in the easement will affect the airstrips, they constitute a condemnation of certain activities on the airstrip.

The jury returned a verdict in the amount of \$611,000 as just compensation for the taking of the easement. On 8 September 2008, the trial court filed its judgment consistent with the jury verdict.

PEC appeals.

II. Standard of Review

On appeal, this Court reviews a jury charge contextually as a whole, "and when so considered if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed, we will not sustain an exception for that the instruction might have been better stated." *Jones v. Development Co.*, 16 N.C. App. 80, 86-87, 191 S.E.2d 435, 439-40 (1972) (citations omitted), *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972). Because PEC asserts the trial court's instruction was in error, PEC bears the burden of proving the jury was misled. *Wilson v. Burch Farms, Inc.*, 176 N.C. App. 629, 634, 627 S.E.2d 249, 254 (2006) (quoting *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002)). "Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Id.* (quoting *Bass*, 149 N.C. App. at 160, 560 S.E.2d at 847).

III. Law of the Case

[1] PEC's assignments of error relate solely to the trial court's instruction to the jury (the jury instruction) that "the easement affects one or both airstrips" and to "the extent the power lines in the easement will affect the airstrips, they constitute a condemnation of certain activities on the airstrip."

In a condemnation proceeding, all issues other than just compensation are determined by the trial court and not a jury. *See* N.C. Gen. Stat. §§ 40A-28(c); -29 (2007). The trial court's 1 September 2005

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order, following the issues hearing, was the subject of the first appeal and this Court's first opinion. One of the issues determined was the area taken on Strickland's property. The trial court found: "The easement to be taken by condemnation over Respondent's property will affect in some way one or both of the two (2) airstrips of the Respondent." The trial court concluded: "Any effect that the condemnation may have on the Respondent's use of his airstrips is a matter to be considered as part of the 'just compensation' determination." In the first appeal, this Court noted that PEC did not assign error to the finding, and it was thus binding on appeal. *Strickland*, 181 N.C. App. at 618, 640 S.E.2d at 861 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). This Court held that "the North Carolina statutes grant petitioner the authority to condemn respondent's land even though it 'will affect in some way one or both of the two (2) airstrips.'" *Id.* at 619, 640 S.E.2d at 862.

When an appellate court passes on an issue and remands the case for further proceedings, "the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal." *State v. Dorton*, 182 N.C. App. 34, 39, 641 S.E.2d 357, 361 (2007) (quoting *Hayes v. Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956)), *disc. review denied*, 361 N.C. 571, 651 S.E.2d 225 (2007). This doctrine is limited to issues, which were actually presented and necessary for determination of the case. *Id.* at 40, 641 S.E.2d at 361. (quoting *Taylor v. Abernethy*, 174 N.C. App. 93, 102, 620 S.E.2d 242, 249 (2005), *disc. review denied and cert. denied*, 360 N.C. 367, 630 S.E.2d 454 (2006)).

One of the issues to be determined in the issues hearing, and before a jury can assess damages, is what area of land is being condemned. *Highway Commission v. Nuckles*, 271 N.C. 1, 14-15, 155 S.E.2d 772, 784 (1967); *see also Dep't. of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 709 (1999) (orders from a condemnation hearing concerning title and area taken are vital preliminary issues). If a jury assesses damages to an area of land before it is determined to be condemned, then on appeal, the jury verdict would be set aside for errors committed by the trial judge in determining issues other than damages. *Nuckles*, 271 N.C. at 14, 155 S.E.2d at 784. In the first appeal, Strickland argued that PEC's easement would unlawfully obstruct the two airstrips on his property. PEC argued that the condemnation of the airstrips was lawful under Chapter 40A of the North

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Carolina General Statutes. This Court determined that the aviation and condemnation statutes could be reconciled, and the condemnation of the airstrips was lawful. Thus, the issue of whether the easement will affect the two airstrips was actually presented and necessary for a determination of this case on the first appeal. The 1 September 2005 order, as affirmed by this Court, is law of the case. The challenged portion of the jury instruction utilized specific language from this Court's opinion in the first appeal, thus it was proper for the trial court to so instruct the jury.

IV. Highest and Best Use

[2] PEC argues that the trial court improperly focused the jury on only one possible use of Strickland's property and took away the jury's fact-finding function of determining the highest and best use of Strickland's property. We disagree.

At the trial on just compensation, the jury determined only one issue, damages. Strickland was entitled to recover as compensation the value of the portion of his land taken and damages to the remaining land not taken. *Light Company v. Creasman*, 262 N.C. 390, 399-400, 137 S.E.2d 497, 504 (1964) (citations omitted). N.C. Gen. Stat. § 136-112 provides that when only a part of the land is taken, "the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking." N.C. Gen. Stat. § 136-112(1) (2007). In arriving at the fair market value immediately prior to the taking, the determinative question is: "[i]n its condition on the day of taking, what was the value of the land for the highest and best use to which it would be put by owners possessed of prudence, wisdom and adequate means?" *Power Co. v. Ham House, Inc.*, 43 N.C. App. 308, 310, 258 S.E.2d 815, 818 (1979).

In the challenged jury instruction, the trial court did not instruct the jury that the airstrips were the highest and best use of Strickland's property. PEC did not assign error to the portion of the jury instruction which did relate to highest and best use:

In arriving at the fair market value of the property immediately before the taking, you should, in light of all the evidence, consider not only the use of the property at that time but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.

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This instruction *immediately* followed the challenged portion of the jury instruction. We consider jury instructions contextually and in their entirety. *Hughes v. Webster*, 175 N.C. App. 726, 730, 625 S.E.2d 177, 180 (2006) (citation omitted), *disc. review denied*, 360 N.C. 533, 633 S.E.2d 816 (2006). When the two instructions are read together, it is clear that the trial court was instructing the jury that the easement affected the airstrips, but that in determining the highest and best use of the land, the jury should look at all of the evidence, including all of the uses to which the land was then *reasonably adaptable*.

PEC cites the case of *Carolina Power & Light Co. v. Creasman* for the proposition that a trial court may not instruct the jury about one particular possible use of land. In *Creasman*, petitioner condemned a portion of respondents' land in connection with the construction, maintenance and operation of a new electricity-generating steam plant. Respondents, over the objection of petitioner, introduced evidence of diminution of value of their property based upon not only the taking of a portion of their property, but also based upon the location of the steam plant, thousands of feet away from the property. The trial court instructed the jury that the respondents contended that the location of the steam plant changed the residential nature of the neighborhood and "that they are entitled to have you assess the diminution in value caused by that." *Creasman*, 262 N.C. at 399, 137 S.E.2d at 504. We find *Creasman* to be inapposite. First, the *Creasman* jury instruction did not stem from a previous opinion of this Court, which constituted the law of the case. Second, the ruling of the Supreme Court in *Creasman* was based upon the erroneous admission of evidence tending to show that the property was diminished in value by the location of the steam plant some distance away from the condemned property. The Supreme Court held:

consequential damages to be awarded the owner for a taking of a part of his lands are to be limited to the damages sustained by him by reason of the taking of the particular part and of the use to which such part is to be put by the acquiring agency. No additional compensation may be awarded to him by reason of proper public use of other lands located in proximity to but not part of the lands taken from the particular owner.

Id. at 402, 137 S.E.2d at 506 (quoting *Spring Valley Water Works & Supply Co. v. Haslach*, 24 Misc.2d 730, 202 N.Y.S.2d 889 (1960)).

In the instant case, the expansion of the easement had a direct impact upon the operation of the two airstrips. It was not a remote impact such as existed in *Creasman*.

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[200 N.C. App. 606 (2009)]

The trial court did not instruct the jury that Strickland would be limited to only certain uses of his land, exactly how the power lines would affect the airstrips, or what activities on the airstrips were being condemned. The jury was simply told that the easement “affects one or both airstrips.” The jury was free to decide what was the highest and best use of Strickland’s land.

Because we determine that the jury instruction was not error, we do not decide whether the error was likely to mislead the jury. *Wilson*, 176 N.C. App. at 634, 627 S.E.2d at 254 (quoting *Bass*, 149 N.C. App. at 160, 560 S.E.2d at 847).

AFFIRMED.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA, PLAINTIFF V. EDWARD CRAIG DUNN, DEFENDANT AND
ACCREDITED SURETY AND CASUALTY, SURETY

No. COA09-188

(Filed 3 November 2009)

**Probation and Parole— forfeiture—motion to set aside—
denied—probation revocation—independent proceeding**

Defendant’s probation revocation hearing was the result of an independent charge for violating his probation and N.C.G.S. § 15A-544.5(f) did not apply (no forfeiture shall be set aside after a defendant fails to appear twice or more in the same case).

Appeal by plaintiff and the Durham Public Schools Board of Education from order entered 13 October 2008 by Judge Brian C. Wilks in Durham County District Court. Heard in the Court of Appeals 1 September 2009.

Tharrington Smith, LLP, by Rod Malone and Christine T. Scheef, for plaintiff-appellant Durham Public Schools Board of Education.

Steven A. McCloskey for defendant-appellee Accredited Surety and Casualty.

No brief filed for defendant Edward Craig Dunn.

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[200 N.C. App. 606 (2009)]

CALABRIA, Judge.

The State of North Carolina (“plaintiff”) and the Durham Public Schools Board of Education (“the Board”)¹ appeal an order denying the Board’s objection to a Motion to Set Aside Bond Forfeiture by Accredited Surety and Casualty (“Surety”) and granting the Surety’s motion.² We affirm.

On 17 April 2007, Edward Craig Dunn’s (“defendant”) release from custody in the Durham County Jail was authorized upon a secured bond in the amount of \$1,500.00 executed by an agent of the Surety. On 7 June 2007, defendant failed to appear in court for charges of possession of a schedule II controlled substance, possession of drug paraphernalia, and unsealed wine/liquor in a passenger area. As a result of his failure to appear, the trial court issued an order for defendant’s arrest. The Surety moved to set aside the bond forfeiture, and the trial court granted this motion. Defendant was subsequently found guilty of possession of drug paraphernalia and sentenced to 45 days in the custody of the Sheriff of Durham County. The trial court suspended defendant’s sentence and placed him on supervised probation for twelve months.

On 27 November 2007, the court found defendant willfully violated his probation, and issued another Order for Arrest. On 1 February 2008, defendant’s release was authorized upon a secured bond in the amount of \$25,000.00. On 14 March 2008, defendant failed to appear as required by the 1 February 2008 release order. When the Surety moved to set aside the bond forfeiture, the trial court granted this motion, and defendant’s release was authorized by the Surety’s third secured bond in the amount of \$25,000.00. On 18 April 2008, defendant failed to appear as required by the 14 March 2008 release order.

On 22 April 2008, an Order for Arrest was issued for defendant, and the trial court issued another Bond Forfeiture Notice for defendant’s failure to appear on 18 April 2008. On 22 May 2008, defendant appeared and waived a probation violation hearing. In addition, defendant admitted that he violated each of the conditions of his probation.³ The trial court revoked defendant’s probation, ordered his

1. The Board’s status as appellant in the instant case is due to its status as the ultimate recipient of the “clear proceeds” of the forfeited appearance bond at issue herein, pursuant to Article IX, § 7 of the North Carolina Constitution. *State v. Poteat*, 163 N.C. App. 741, 744, 594 S.E.2d 253, 254 n.2 (2004).

2. Defendant Edward Craig Dunn is not a party to this appeal.

3. The probation violation report is not part of the record on appeal.

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suspended sentence activated and also ordered him to serve 45 days in the custody of the Sheriff of Durham County.

On 30 May 2008, the Surety filed a Motion to Set Aside Bond Forfeiture for the third bond. On 6 June 2008, the Board filed an Objection to the Surety's motion. On 6 August 2008, a hearing was held regarding the bond forfeiture in Durham County District Court. On 13 October 2008, the trial court entered an order denying the Board's objection and granting the Surety's motion. From this order, the Board appeals.

The Board contends the trial court erred by finding that defendant's probation violation was a new charge and by concluding, as a matter of law, that N.C. Gen. Stat. § 15A-544.5(f) (2007) was inapplicable to the new charge. We disagree.

When the trial court sits without a jury, the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. *State v. Lazaro*, — N.C. App. —, —, 660 S.E.2d 618, 619 (2008).

In conclusion of law #2, the trial court cited the relevant section of the statute regarding setting aside a bond forfeiture:

2. N.C. Gen. Stat. § 15A-544.5(f) provides that “[i]n any case in which the State proves that the surety or the bail agent had notice or actual knowledge, before executing a bail bond, that the defendant had already failed to appear on two or more prior occasions, no forfeiture of that bond may be set aside for any reason.”

In conclusion of law #3, the trial court referred to the charges as original charges and independent charges:

3. N.C. Gen. Stat. § 15A-544.5(f) is not applicable because the original charge for which the defendant had been bonded was resolved and the probation violation is treated as a new independent charge.

In construing a statute, it is the duty of this Court to “carry out the intent of the legislature.” *State v. Ward*, 46 N.C. App. 200, 206, 264 S.E.2d 737, 741 (1980). *See also State v. Partlow*, 91 N.C. 550, 552, 49 Am. Rep. 652, 652 (1884) (“It is plainly the duty of the court to so construe a statute, ambiguous in its meaning, as to give effect to the legislative intent, if this be practicable.”). “As a cardinal principle of

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statutory interpretation, '[i]f the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms.' " *State v. Watterson*, — N.C. App. —, —, 679 S.E.2d 897, 900 (2009) (quoting *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993)).

The statute refers to the word "case." The applicable definition of "case" from BLACK'S LAW DICTIONARY ("Black's") is, "Case: a civil or criminal proceeding, action, suit, or controversy at law or in equity." BLACK'S LAW DICTIONARY 243 (9th ed. 2009). The trial court concluded that defendant's probation violation was a new independent charge. According to Black's definition, defendant's original case was possession of drug paraphernalia and the bond was resolved when defendant was convicted and placed on probation. Defendant's subsequent probation revocation hearing was a result of an independent charge for violating his probation.

N.C. Gen. Stat. § 15A-1345 (2007) "guarantees full due process before there can be a revocation of probation and a resulting prison sentence." *State v. Hunter*, 315 N.C. 371, 377, 338 S.E.2d 99, 104 (1986). Specifically, N.C. Gen. Stat. § 15A-1345 (2007) "guarantees notice, bail, a preliminary hearing and a revocation hearing with counsel present." *Id.* "At the revocation hearing, the trial judge must make findings to support his decision on whether to revoke or extend probation . . . [and] make a summary record of the proceedings." *Id.* In *State v. Duncan*, our Supreme Court stated, "[t]he courts of this State recognize the principle that a defendant on probation . . . , before any sentence of imprisonment is put into effect and activated, shall be given notice of the hearing and an opportunity to be heard." 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). These due process requirements, although less than the protections guaranteed in a criminal trial, are still sufficiently significant to support the conclusion that a probation revocation hearing is a new case.

Although it is true, as the Board suggests, that a probation revocation hearing is only possible after a defendant has been found guilty of underlying criminal conduct, it is equally true that such underlying conduct is not the focus of the hearing. Rather, the trial court must determine whether the defendant willfully violated one or more conditions of his probation. *State v. Dixon*, 139 N.C. App. 332, 341, 533 S.E.2d 297, 304 (2000). A probation revocation hearing is a controversy entirely distinct from the underlying criminal conduct.

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In the instant case, defendant's underlying criminal conduct was his possession of drug paraphernalia. For this offense, defendant was placed on supervised probation for 12 months. Defendant subsequently violated his probation. In its judgment revoking defendant's probation, the trial court found, *inter alia*, that defendant "admitted that [he] violated each of the conditions of [his] probation as set forth . . . in paragraph[] 1 in the Violation Report or Notice dated 11/27/07." Therefore, defendant's underlying criminal conduct was not the focus of the probation revocation hearing, and the hearing was a new case according to N.C. Gen. Stat. § 15A-544.5(f) (2007). Since it was a new case, the trial court set aside the bond forfeiture.

The Board's remaining assignments of error were not addressed in its brief to this Court and are therefore deemed abandoned. N.C. R. App. P. 28(b)(6) (2009). Having resolved this appeal in favor of the Surety, we decline to address its remaining arguments.

We affirm the trial court's order denying the Board's objection and granting the Surety's motion to set aside the bond forfeiture.

Affirmed.

Judges WYNN and ELMORE concur.

STATE OF NORTH CAROLINA v. JEFFERY GARDNER

No. COA08-1094

(Filed 3 November 2009)

Sexual Offenders— satellite-based monitoring—findings

An order directing defendant to enroll in satellite-based monitoring pursuant to N.C.G.S. § 14-208.40B (2007) was vacated and remanded for a new hearing where the trial court did not make the determination required by the statute.

Appeal by defendant from order entered 15 May 2008 by Judge Ronald E. Spivey in Randolph County Superior Court. Heard in the Court of Appeals 11 February 2009.

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[200 N.C. App. 610 (2009)]

Attorney General Roy Cooper, by Special Counsel Hilary S. Peterson, for the State.

Jason G. Goins, for defendant-appellant.

CALABRIA, Judge.

Jeffery Gardner (“defendant”) appeals from the trial court’s order directing him to enroll in satellite-based monitoring (“SBM”) pursuant to N.C. Gen. Stat. § 14-208.40B (2007). We vacate and remand for rehearing.

On 12 July 1993, defendant was convicted of indecent liberties with a child. On 7 August 2003, defendant was convicted of indecent liberties with a child and attempted second degree sexual offense. Defendant received an active sentence of 61-83 months in the North Carolina Department of Correction (“the DOC”) for the attempted second degree sexual offense conviction and a sentence of 21-26 months, suspended for a probationary sentence, for the indecent liberties conviction. On 8 January 2008, defendant was granted post-release supervision in lieu of the time that remained on his active sentence. Defendant testified that it was his belief that he would remain on post-release supervision until 8 January 2011.

On 15 May 2008, the trial court conducted a determination hearing pursuant to N.C. Gen. Stat. § 14-208.40B (2007) to determine whether defendant was eligible for SBM. At the hearing, defendant conceded that he was a recidivist as defined by N.C. Gen. Stat. § 14-208-40(a) (2007). The trial court ordered defendant to enroll in SBM for the remainder of his natural life.

The trial court’s order consisted of four pages. The first page of the order was a “form order,” provided by the Administrative Office of the Courts (Form AOC-CR-616, New 12/07). However, the trial court also added three pages of additional findings of fact and conclusions of law to the one page form order. In these additional pages, the trial court addressed defendant’s argument that lifetime SBM did not exist at the time of his sentencing and therefore (1) imposition of lifetime SBM on defendant was an invalid *ex post facto* punishment; and (2) imposition of lifetime SBM violated defendant’s double jeopardy protections. The trial court ultimately concluded as follows:

This court will find that the provision that allows satellite monitoring for recidivist (sic) as a condition of post-release supervision is valid, does not violate the defendant’s constitutional

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rights, and this court will order that pursuant to 14-208.40B, *the defendant shall submit to satellite based monitoring as a condition of post-release supervision* (sic). This court will further note that pursuant to statute, this monitoring shall be for the remainder of this (sic) natural life. However, this court will further note for the record that it is the opinion of this court that the Defendant may have a persuasive argument that when his post-release supervision is completed, that further monitoring of the defendant, *given the time line of this case and the fact that the monitoring is based solely upon the post-release supervision provision*, that further monitoring at that point may be a violation of one or both clauses argued by defendant, however it is not necessary for this court to make a determination of that future event for purposes of this ruling which the statute gives clear directives that apply to this case. *That issue will not be ripe for consideration until he finishes his post release supervision.*

(emphasis added).

Defendant notes that the trial court's order "emphasized that his imposition off (sic) lifetime GPS monitoring under N.C. Gen. Stat. § 14-208.40(B) was as a condition of post-release supervision," citing the language from the order quoted above. Defendant argues that the trial court "repeatedly and incorrectly emphasized that GPS monitoring was simply a condition of Appellant's post release supervision." Defendant contends that the trial court did so because "somehow that made it all right to apply § 14-208.40 to Appellant upon his release, as though that erased the ex post facto and double jeopardy taint."

Although this Court has previously considered and rejected defendant's *ex post facto* arguments, *State v. Bare*, — N.C. App. —, —, 677 S.E.2d 518, 522-31 (2009); *State v. Wagoner*, — N.C. App. —, —, — S.E.2d —, — (2009), defendant has correctly identified a deficiency in the trial court's order which must be addressed.

The determination on the first page of the trial court's order conflicts with the additional findings and conclusions the trial court later added on the subsequent pages. The first page of the order states that "defendant shall enroll in satellite-based monitoring under Article 27A of Chapter 14 of the General Statutes for . . . the remainder of defendant's natural life." However, the additional findings and con-

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clusions added by the trial court to the order provide that (1) “defendant shall submit to satellite based monitoring as a condition of post-release supervision . . .”; (2) “the monitoring is based solely upon the post-release supervision provision . . .”; and (3) “[whether SBM violates the ex post facto clause or double jeopardy clause] will not be ripe for consideration until he finishes his post release supervision.” Therefore, the order in its entirety contains conflicting terms, making it unclear whether the trial court ordered defendant to enroll in SBM for the remainder of his natural life, as provided in the first page of the order, or if defendant’s enrollment in SBM was only required because he was on post-release supervision. It would appear, based on the portion of the order added by the trial court, that the DOC would need to request another hearing regarding defendant’s enrollment in SBM when defendant completes his post-release supervision.

Where there is a conflict within the terms of a trial court’s order, this Court has found “an elementary principle of contract interpretation instructive . . . ‘[w]hen a contract is partly written or typewritten and partly printed any conflict between the printed portion and the [type]written portion will be resolved in favor of the latter.’” *In re B.E.*, 186 N.C. App. 656, 661, 652 S.E.2d 344, 347 (2007) (quoting *National Heater Co., Inc. v. Corrigan Co. Mech. Con., Inc.*, 482 F.2d 87, 89 (8th Cir. 1973)). Thus, the portion of the order which indicates that the trial court ordered SBM only as a condition of post-release supervision, and not lifetime SBM under N.C. Gen. Stat. § 14-208.40B, is controlling. Because the trial court failed to make the appropriate determination as required by N.C. Gen. Stat. § 14-208.40B, we must vacate the order and remand this matter to the trial court for rehearing upon the DOC’s request for defendant’s enrollment in SBM. Because we are remanding for a new hearing, we need not address defendant’s remaining assignments of error.

Vacated and remanded.

Judges ELMORE and STROUD concur.

STATE v. HAGERMAN

[200 N.C. App. 614 (2009)]

STATE OF NORTH CAROLINA v. RAYMOND CHARLES HAGERMAN

No. COA09-145

(Filed 3 November 2009)

Sexual Offenders— satellite-based monitoring—civil penalty—not punishment enhancement

The State did not need to present any fact in an indictment or to prove any facts beyond a reasonable doubt to a jury in order to subject defendant to satellite-based monitoring (SBM). The imposition of SBM is a civil remedy which does not increase the maximum penalty for defendant's crime.

Judge ELMORE dissenting.

Appeal by defendant from order entered 15 October 2008 by Judge Thomas H. Lock in Onslow County Superior Court. Heard in the Court of Appeals 20 August 2009.

Attorney General Roy Cooper, by Assistant Attorney General Joseph Finarelli, for the State.

Jon W. Myers, for defendant-appellant.

CALABRIA, Judge.

Raymond Charles Hagerman ("defendant") appeals the trial court's order directing him to enroll in lifetime satellite-based monitoring ("SBM") pursuant to N.C. Gen. Stat. § 14-208.40B (2007). We affirm.

On 15 October 2008, defendant pled no contest to four counts of indecent liberties with a minor. Defendant was sentenced to four consecutive active sentences of a minimum of 16 months to a maximum of 20 months in the North Carolina Department of Correction. Two of these sentences were suspended and defendant was sentenced to two consecutive probationary sentences of 36 months each to be served at the end of his active sentences. After sentencing, the trial court conducted a determination hearing pursuant to N.C. Gen. Stat. § 14-208.40B (2007) to determine whether defendant was eligible for SBM. Prior to the hearing, defendant filed a motion challenging the constitutionality of N.C. Gen. Stat. §§ 14-208.40-45 (2007). The trial court denied defendant's motion. After a hearing, the trial court found that defendant's offenses were aggravated and ordered defendant to enroll in lifetime SBM. Defendant appeals.

STATE v. HAGERMAN

[200 N.C. App. 614 (2009)]

Defendant argues that, pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), the imposition of lifetime SBM constituted an enhancement of defendant's punishment. He further argues that the trial court's determination required facts not presented in the indictment, conceded by defendant, or found by a jury beyond a reasonable doubt, in violation of defendant's constitutional rights. We disagree.

"[A]ny fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476, 147 L. Ed. 2d. at 446 (citation omitted). This Court has analyzed the SBM statutes in *State v. Bare* and determined that the imposition of lifetime SBM by the legislature was part of a civil, regulatory scheme and not a criminal punishment. *State v. Bare*, — N.C. App. —, —, — S.E.2d —, — (2009); *see also State v. Wagoner*, — N.C. App. —, —, — S.E.2d —, — (2009); *State v. Morrow*, — N.C. App. —, —, — S.E.2d —, — (2009); *State v. Stines*, — N.C. App. —, —, — S.E.2d —, — (2009). Therefore, the imposition of SBM, as a civil remedy, could not increase the maximum penalty for defendant's crime. The State did not need to present any facts in an indictment or prove any facts beyond a reasonable doubt to a jury in order to subject defendant to SBM.

The record on appeal includes additional assignments of error not addressed by defendant in his brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6) (2008), we deem them abandoned and need not address them.

Affirmed.

Judge BRYANT concurs.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

I respectfully dissent from the majority opinion affirming the trial court's order requiring defendant to enroll in satellite-based monitoring. I would reverse and remand the trial court's order for the reasons stated by my dissents in *State v. Wagoner*, — N.C. App. —, — S.E.2d —, — (2009) (Elmore, J., dissenting), *State v. Morrow*, — N.C. App. —, —, — S.E.2d —, — (2009) (Elmore, J., concurring

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[200 N.C. App. 614 (2009)]

in part and dissenting in part), and *State v. Vogt*, — N.C. App. —, —, — S.E.2d —, — (2009) (Elmore, J., dissenting). For the reasons stated therein, I would hold that enrolling defendant in lifetime satellite-based monitoring after finding that his offenses were aggravated increases the maximum penalty for his crime and must, under *Apprendi*, “be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 476, 147 L. Ed. 2d 435, 446 (2000) (citation omitted).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 NOVEMBER 2009)

HODGES v. HODGES No. 09-128	Henderson (96CVD96)	Affirmed
HODGES v. HODGES No. 09-129	Henderson (97CVD509)	Affirmed
HODGES v. HODGES No. 09-130	Henderson (98CVD363)	Affirmed
IKECHUKWU v. IKECHUKWU No. 09-46	Durham (04CVD636)	Affirmed in part; Reversed and Remanded in part
IN RE A.A. No. 09-818	Wake (07JT819)	Affirmed
IN RE: C.B. AND S.B. No. 09-669	Macon (07JA36) (07JA35)	Affirmed
IN RE H.N.J., A.S.J. No. 09-871	Northampton (08JA2) (08JA1)	Affirmed
IN RE J.H.R. No. 09-809	Rutherford (07JT79)	Affirmed
IN RE J.J.R. No. 09-689	Wake (08JA869)	Affirmed
IN RE J.M.D. No. 09-746	Greene (07JA36) (07JA37) (07JA35) (07JA38)	Reversed and Remanded
IN RE M.X. No. 09-514	Mecklenburg (07JT64)	Affirmed
IN RE N.F. No. 09-734	Buncombe (08JT315)	Vacated
IN RE T.G.W. No. 09-693	Buncombe (08JT271)	Affirmed
IN RE W.D.M. No. 09-803	Henderson (03JT157)	Affirmed
KISSLO v. TATUM No. 09-104	Guilford (08CVS3118)	Affirmed

SHORTS v. MEGA FORCE STAFFING No. 08-1506	Indus. Comm. (IC596200)	Affirmed
STATE v. AMOS No. 08-1540	Durham (07CRS45237)	No error; Remanded for correction of clerical error
STATE v. GONZALEZ No. 08-1591	Mecklenburg (07CRS233007) (07CRS233009) (07CRS233006)	Affirmed
STATE v. HERNANDEZ No. 08-1446	Pitt (01CRS7516) (01CRS55646) (01CRS8952) (01CRS55649)	Affirmed
STATE v. HUGHES No. 09-288	Guilford (03CRS24106)	Affirmed
STATE v. MILLER No. 09-623	Mecklenburg (07CRS38446) (07CRS38447) (07CRS38444)	Affirmed
STATE v. SKIPPER No. 09-161	Sampson (04CRS54630)	Vacated in part, no error in part, and remanded
STATE v. TAYLOR No. 08-1467	McDowell (07CRS50203)	No Error
WORSHIP VENTURES v. JUDD MINISTRIES No. 09-123	Wake (07CVS3655)	Reversed and Remanded

METCALF v. BLACK DOG REALTY, LLC

[200 N.C. App. 619 (2009)]

LOUISE PACK METCALF, BARBARA PACK HOLCOMBE, MICHAEL LAWRENCE,
BARBARA PACK WHITE, AND ALICE WHITE MOBIDINE, PLAINTIFFS V. BLACK
DOG REALTY, LLC AND BUNCOMBE COUNTY, NORTH CAROLINA, DEFENDANTS

No. COA08-1561

(Filed 3 November 2009)

1. Declaratory Judgments— standing—action to quiet title

The trial court did not err in a declaratory judgment action regarding the use of public property by denying defendant company's motion to dismiss based upon plaintiffs' lack of standing. To the extent that this is an action to quiet title, the pleadings have raised an actual controversy which is a proper subject for an action under the Uniform Declaratory Judgment Act.

2. Declaratory Judgments— summary judgment—written findings of fact and conclusions of law not required

The trial court did not err in a declaratory judgment action regarding the use of public property by denying defendants' motion for written findings of fact and conclusions of law in an order granting summary judgment. There were no issues of fact that were material to the resolution of the legal issues and the trial court was not required to make conclusions of law in the order.

3. Cities and Towns— dedication to public—common law offer and acceptance applies

The common law principles of offer and acceptance apply to dedications because North Carolina does not have statutory guidelines for dedications to the public.

4. Cities and Towns— express dedication—offer and acceptance—courthouse property

The trial court erred by granting summary judgment in favor of plaintiffs based on an offer of 31 December 1900 and acceptance of that offer as creating an express dedication of the courthouse property.

5. Cities and Towns— express public dedication—common law rules

The trial court erred by granting summary judgment in favor of plaintiffs based on the language of a deed as grounds for an express public dedication, and the trial court should have entered summary judgment in favor of defendants on this issue.

METCALF v. BLACK DOG REALTY, LLC

[200 N.C. App. 619 (2009)]

6. Cities and Towns—implicit dedication—intent of owner

The trial court erred by granting summary judgment for plaintiffs and not for defendants on the issue of implied dedication. There was no evidence that the owner ever had any intent to dedicate the courthouse property for use as an independent public park and even if plaintiffs' allegations that the courthouse property has been used for public purposes are taken as true, a county is not bound to continue to use real property in that manner for any particular period of time.

Appeal by defendant Black Dog Realty, LLC from orders entered 15 September 2008 and 18 September 2008 by Judge J. Marlene Hyatt in Superior Court, Buncombe County. Heard in the Court of Appeals 19 May 2009.

Ferikes and Bleynat, PLLC, by Joseph A. Ferikes and Mary March Exum, for plaintiff-appellees.

Johnston, Allison & Hord, P.A., by Patrick E. Kelly, Daniel A. Merlin, and Michael L. Wilson, for defendant-appellant.

McGuire, Wood & Bisette, PA by Joseph P. McGuire, for defendant-appellant.

No brief filed on behalf of Buncombe County.

STROUD, Judge.

George Willis Pack conveyed real property to Buncombe County in 1901 for use as a site for a new courthouse and county offices, in exchange for the County's dedication of the old courthouse site "forever to be used for the purpose of a public square park or place" A small portion of the real property which Pack conveyed to Buncombe County, known as the "Old County Jail Lot" is the subject of this action. This case presents the legal issue of whether there was an express or implied dedication of the property Pack conveyed to the County for irrevocable public use for the county courthouse and county offices or for a public park. Based upon Pack's offer to convey the property, the County's acceptance and the July 1901 deed, and considering the rules of construction applicable to these documents, we hold that the trial court erred in granting summary judgment to the Plaintiffs and enjoining defendant Black Dog Realty from any use of the real property inconsistent with the alleged dedication.

METCALF v. BLACK DOG REALTY, LLC

[200 N.C. App. 619 (2009)]

I. Background

On 7 January 1901, the Board of Commissioners of Buncombe County (“the Board”) recorded an order in the minutes of the Board to accept (“the acceptance”) the following offer (“the offer”) from George W. Pack (“Pack” or “Mr. Pack”), made on 31 December 1900:

I offer to give to the County to be used for a site for a Court house and County offices the land on College Street in Asheville which I purchased of Col. A.T. Davidson [(“the courthouse property”)] provided that the County will dedicate to the public forever to be used for the purpose of a public square park or place whatever land [(“the Pack Square property”¹)] the County may own within the limits of the public square so called, in Asheville, the present Court House, to be removed there from prior to such date as you may agree upon with Judge Merrimon and Mr. Gwyn acting for me[.]

On 24 July 1901, pursuant to the Board’s 7 January 1901 acceptance of the offer, Pack and his wife, Frances Pack (“Mrs. Pack”), executed a deed (“the July deed”) conveying the property (“the courthouse property”) to the Commissioners of Buncombe County. Although the granting, habendum, and warranty clauses of the deed all conveyed the property in fee simple to the County, the last section of the July deed stated that the courthouse property was conveyed subject to the conditions that: (1) the new court house be completed and occupied by 1 January 1903 and the old court house removed from the future Pack Square by 1 July 1903, (2) no jail shall ever be built on the courthouse property, and (3) the courthouse property would never be sold or leased. It also provided that the property would revert to Pack and his heirs if any of the conditions were ever violated. These conditions in the July deed were not stated in the 31 December 1900 offer, including the condition that the courthouse property could never be sold or leased.

1. We will refer to the land on which the *old* courthouse was located, which the County was to “dedicate to the public forever to be used for the purpose of a public square park or place” as Pack Square, which is the name this property has been known by for many years. See *Alvey v. City of Asheville*, 146 N.C. 395, 395, 59 S.E. 999, 999-1000 (1907) (“Pack Square . . . is held and ‘dedicated to free and unobstructed public use’ in connection with a monument there placed in honor of one of the State’s greatest citizens—Zebulon B. Vance.”) It was not so identified or named in the offer or acceptance in 1901, but we use this title for ease of reference and to avoid confusion of the Pack Square tract of land with the courthouse property or with the City-County Plaza.

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On 14 December 1901, Mr. and Mrs. Pack executed a substitute deed (“the December deed”) of the courthouse property to the County. The December deed stated that it was “executed in lieu of and as a substitute for the deed executed by the parties of the first part on the 24th day of July 1901[.]” The granting clause of the December deed stated that Mr. and Mrs. Pack “do give, grant, bargain, sell and convey to the said party of the second part [the Board of Commissioners of Buncombe County] and to their successors in Office forever” the courthouse property. The habendum clause of the substitute deed added:

To have and to hold the said lot or parcel of land with all the appurtenances thereunto belonging unto the said party of the second part its successors in office, forever, for the following and no other purpose, to wit: that is to say for the site of a County Court House, County Offices and such other purposes strictly incident to the usual and convenient occupation and use of said Court House and County Offices by the County Officials and the public.

After the habendum clause, the December deed provided that the parties “[waive] all conditions named in said deed of July 24th 1901; the said parties hereby waiving all conditions named in said deed . . . and agreeing as above stated that said lot shall be used as a site for a Court House and County Offices as hereinbefore set forth.” The December deed contained no warranty clause. The December deed was executed only by Mr. and Mrs. Pack.

In or about 1903, the County constructed a courthouse and county office building on the courthouse property, although the 1903 courthouse was torn down in approximately 1928 and the current courthouse was later constructed. Despite the exact location of either courthouse, it appears that the parties are in agreement that the Old County Jail Lot, which is a small portion of the courthouse property, has been used as a part of the “public land surrounding [the courthouse or other county offices]” continuously since 1928.

In 2006, the Board passed a resolution authorizing “the commencement of the bidding process for the sale of . . . the “Old County Jail Lot[.]” The Board sold the property in accordance with N.C. Gen. Stat. § 160A-269. The Board published defendant Black Dog Realty’s bid on 24 October 2006, setting a deadline of 3 November 2006 for upset bids. The Board ultimately accepted the highest bid, by defendant Black Dog Realty. On 21 November 2006, Buncombe County conveyed the Old County Jail Lot to Black Dog Realty.

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On 28 September 2007, plaintiffs Louise Pack Metcalf (“Metcalf”), Barbara Pack Holcombe (“Holcombe”), and Michael Lawrence (“Lawrence”) filed a complaint in Superior Court, Buncombe County for declaratory judgment, injunction, and breach of contract. The complaint alleged that

the offer of the subject property² by George Willis Pack and the acceptance of his offer by Buncombe County created perpetual rights in and to the subject property in favor of the public, including, but not limited to, dedication as an easement. Such easement was dedicated to the public for use as a park and as a site for a Court House and County Offices.

The complaint further alleged that defendant Black Dog Realty “has and intends to interfere with and [sic] the public’s property rights to access and use the [courthouse property] for public purposes.” As a remedy, the complaint requested the trial court to “permanently enjoin the Defendants, their agents, or anyone acting on their behalf from blocking or interfering with the public’s easement and rights in and to the [courthouse property].” Further, the complaint requested a reversion of the courthouse property to the heirs and descendants of George Willis Pack and monetary damages for breach of contract. The complaint was amended on 29 November 2007 to add Barbara Pack White (“White”) and Alice White Mobidine (“Mobidine”) as plaintiffs.

On or about 28 December 2007, defendant Buncombe County (“the County”) moved to dismiss Plaintiffs’ complaint for want of standing and for failure to state a claim and raised several affirmative defenses. On 8 January 2008, defendant Black Dog Realty likewise moved to dismiss, raised numerous affirmative defenses, and brought counterclaims against Plaintiffs for slander of title and to quiet title pursuant to N.C. Gen. Stat. § 41-10 and in equity. The County filed a motion for summary judgment on 31 July 2008. Plaintiffs moved for summary judgment on 13 August 2008.

The trial court heard all of the pending motions on 25 August 2008 and entered judgment on 15 September 2008. The judgment denied Defendants’ motions to dismiss, denied the County’s motion

2. By “subject property,” the complaint is referring to the entire tract we identify in this opinion as the “courthouse property”, and the Old County Jail Lot is a portion of the courthouse property. The land which the County conveyed to Black Dog Realty is identified in the deed in part as “that certain tract or parcel of land known as the ‘Old County Jail Lot’ ” and thus we will refer to the tract by this title also.

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for summary judgment, and granted Plaintiffs' motion for summary judgment. The judgment was based upon Plaintiffs' claim for declaratory judgment pursuant to N.C. Gen. Stat. § 1-253 et seq. and the claim for injunctive relief, but did not specifically address Plaintiffs' claim for breach of contract or for reversion of the courthouse property, including the Old County Jail Lot, to Pack's heirs or descendants or for monetary damages. The judgment also did not mention defendant Black Dog Realty's claims for slander of title or to quiet title.³ The trial court decreed "pursuant to N.C.G.S. § 1-253 et seq., that the subject property described in and attached to Plaintiffs' Amended Complaint⁴ has been and continues to be subject to the offer of dedication by George W. Pack and the acceptance . . . by the Board of Commissioners of Buncombe County, North Carolina, and that said land shall only be used for purposes consistent with said dedication and acceptance."⁵ The trial court further "permanently enjoined" Defendants from using the courthouse property "in any way inconsistent with the dedication and this Judgment."

Defendant Black Dog Realty made a motion for written findings of fact and conclusions of law pursuant to N.C. Gen. Stat. § 1A-1, Rules 52(a) and 52(b) on 15 September 2008. The trial court denied the motion for written findings of fact and conclusions of law on 18 September 2008. Defendants appeal from the order granting summary judgment as to the Plaintiffs' claim for declaratory judgment as well as the order denying their motion for written findings of fact and conclusions of law.

3. Although the judgment did not mention Plaintiffs' other claims or Black Dog Realty's counterclaims, as it was a declaratory judgment that the courthouse property, including the Old County Jail Lot, had been irrevocably dedicated to "purposes consistent with [that] dedication," the Plaintiffs' additional claims and defendant Black Dog Realty's counterclaims were implicitly denied. As the trial court did not grant the individual Plaintiffs' claims for reversion of the courthouse property or for monetary damages, and Plaintiffs did not cross-appeal from this ruling, only the Defendants' appeal of the declaratory judgment is at issue. Plaintiffs also acknowledged at oral argument and in their brief that they have abandoned their claims as heirs or descendants of Pack for breach of contract, reversion or monetary damages.

4. The "subject property" in the trial court's order is the property referred to herein as the courthouse property, of which the Old County Jail Lot was a small portion.

5. The purpose of the dedication as stated by the offer was a "site for a Court house and County offices." Although we are not certain that it would be possible for Black Dog Realty, as a private landowner, to use the Old County Jail Lot as a "site for a Courthouse and County offices," this is apparently what the trial court ordered.

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II. Standing

A. Standard of Review

A ruling on a motion to dismiss for want of standing is reviewed de novo. *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008). “In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party.” *Id.* In our analysis of standing, we also consider that “North Carolina is a notice pleading jurisdiction, and as a general rule, there is no particular formulation that must be included in a complaint or filing in order to invoke jurisdiction or provide notice of the subject of the suit to the opposing party.” *Id.* (citing *Mangum v. Surles*, 281 N.C. 91, 99, 187 S.E.2d 697, 702 (1972)).

Standing is determined at the time of the filing of a complaint. “Our courts have repeatedly held that standing is measured at the time the pleadings are filed. The Supreme Court has explained that ‘[w]hen standing is questioned, the proper inquiry is whether an actual controversy existed’ when the party filed the relevant pleading.” *Quesinberry v. Quesinberry*, — N.C. App. —, —, 674 S.E.2d 775, 778 (2009) (citation omitted).

B. Controlling Law

[1] Defendants argue that Plaintiffs lack standing to bring this lawsuit because they are not parties to the 1901 deeds and there is no evidence that they are the heirs of Pack or that they otherwise have any right, title or interest in the courthouse property.⁶ Most of Defendants’ argument as to standing is based upon Plaintiffs’ claims for reversion of the courthouse property or for enforcement of restrictions upon use of the Old County Jail Lot “for the personal benefit of the grantor,” Pack. For Plaintiffs to have standing as to those claims, we agree that the Plaintiffs would have to demonstrate that they are heirs or descendants of Pack or that they have some right, title, or interest in the courthouse property and the Old County Jail Lot. In their answers to interrogatories and affidavits, the most that any plaintiff has been able to confirm is that each plaintiff believes Pack to be one of his or her ancestors; no plaintiff has been able to establish that he or she is a lineal descendant or heir of Pack. Plaintiffs

6. As the briefs often use the general term “subject property” to refer to the courthouse property only, the Old County Jail Lot only, or both, we will instead use the terms “courthouse property” and “Old County Jail Lot” in this opinion for clarity.

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have failed to demonstrate that they would have standing as to any claim of reversion or breach of contract, viewing the evidence in the light most favorable to the Plaintiffs. However, as noted above, Plaintiffs have abandoned their claims for reversion, breach of contract, and monetary damages, and only the declaratory judgment claim and injunctive relief are at issue.

Plaintiffs note in their brief that

plaintiffs want to make it clear to this Court, and to defendant Black Dog, that they are not seeking to have the [courthouse property] returned to them as descendants of George Pack Plaintiffs' concern, and the concern of the citizens of Buncombe County, is that the property remain in the public realm and be put solely to public uses, as was clearly stated in both deeds and in the offer of dedication, and as the property has been used for over 100 years. The property is subject to that restriction, whether owned by Black Dog, Buncombe County or the Pack heirs themselves. That is the remedy the Pack heirs have elected.

Plaintiffs argue that they have standing as "citizens and taxpayers . . . to seek equitable relief when governing authorities *are preparing* to put property dedicated to the public, to an unauthorized use." (emphasis added). Plaintiffs are correct that in certain situations, a citizen may have standing to seek equitable relief *from his or her local government*.

That a citizen, in his own behalf and that of all other taxpayers, may maintain a suit in the nature of a bill in equity to enjoin the governing body of a municipal corporation *from transcending their lawful powers or violating their legal duties* in any mode which will injuriously affect the tax-payers—such as making an unauthorized appropriation of the corporate funds, or an illegal or *wrongful disposition of the corporate property*, etc.—is well settled.

Merrimon v. Southern Paving & Const. Co., 142 N.C. 539, 545, 55 S.E. 366, 367 (1906) (emphasis added), *cited with approval in Goldston v. State*, 361 N.C. 26, 32, 637 S.E.2d 876, 880 (2006). However, this case is unique, in that although the County is a defendant, Plaintiffs do not seem to be seeking relief from the County.⁷

7. Defendant County did file motions to dismiss the Plaintiffs' claims as to the County based upon the Plaintiffs' standing and pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), and these motions were denied. Defendant County did not appeal the trial court's orders and did not file a brief before this court.

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Plaintiffs did not allege that the County “transcended [its] lawful power or violated [its] legal duties” by selling or disposing of the Old County Jail Lot. The County sold the Old County Jail Lot to Black Dog Realty nearly a year before the inception of this action. The remainder of the courthouse property is still being used as a site for the county courthouse and office building; there is no contention that any defendant has used or intends to use the courthouse property which is still owned by the County in any manner inconsistent with the alleged dedication. As to the Old County Jail Lot, the most the Plaintiffs could complain of at this point in time as to the County is that the County is not seeking to prevent Black Dog Realty from using the lot in a manner inconsistent with the alleged dedication. However, the trial court has enjoined both Defendants from using the courthouse property, including both the portion still owned by the County, and the Old County Jail Lot, owned by Black Dog Realty, in any manner inconsistent with the alleged public dedication of the property.

Thus we must clearly identify the standing issue presented to the court in this case, something no party has done in their briefs. The question is whether Plaintiffs have standing to seek a declaratory judgment that the Old County Jail Lot, now owned by Black Dog Realty, is subject to restrictions in use based upon the alleged dedication of the courthouse property for use as a courthouse or a park. N.C. Gen. Stat. § 1-254 establishes the requirements for standing to seek a declaratory judgment:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder

N.C. Gen. Stat. § 1-254 (2007). This court has noted that under the Declaratory Judgment Act,

[s]tanding refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter. A party seeking standing has the burden of proving three necessary elements:

(1) “injury in fact”—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent,

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not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

....

A party has standing to initiate a lawsuit if he is a real party in interest. A real party in interest is one who benefits from or is harmed by the outcome of the case and by substantive law has the legal right to enforce the claim in question.

Beachcomber Properties, L.L.C. v. Station One, Inc. 169 N.C. App. 820, 823-24, 611 S.E.2d 191, 193-94 (2005) (internal citations and quotation marks omitted). Although Plaintiffs did allege in their complaint and amended complaint that they have a legally protected interest in the courthouse property, by virtue of their status as Pack's heirs or descendants, their affidavits and responses to discovery demonstrate that Plaintiffs cannot support that allegation.

However, defendant Black Dog Realty brought a counterclaim to quiet title, pursuant to N.C. Gen. Stat. § 41-10 (2007).

[A] suit to quiet title to real property under G.S. [§] 41-10 . . . is designed and intended to provide a means for determining all adverse claims, equitable or otherwise. It is not limited to a particular instrument, bit of evidence, or encumbrance but is aimed at silencing all adverse claims, documentary or otherwise. Any action that could have been brought under the old equitable proceeding to remove a cloud upon title may now be brought under the provision of G.S. [§] 41-10. This statute has been liberally construed.

York v. Newman, 2 N.C. App. 484, 488, 163 S.E.2d 282, 285, *disc. rev. denied*, 274 N.C. 518 (1968). Because the counterclaim to quiet title is defendant Black Dog Realty's claim, this case presents a quandary as to standing, because if we were to find that no plaintiff has standing and that the Plaintiffs' claims should have been dismissed on that basis, we are still left with Black Dog Realty's counterclaim to quiet title, which raises the very same legal issues.⁸ We therefore conclude that at least to the extent that this is an action to quiet title, the pleadings have raised "an actual controversy [which] is a proper subject for an action under the Uniform Declaratory Judgment Act." *Id.* at

8. We note that Plaintiffs did not file a reply to Black Dog Realty's counterclaim to quiet title and did not move to dismiss the counterclaim.

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490, 163 S.E.2d at 286. The trial court therefore did not err by denying defendant Black Dog Realty's motion to dismiss based upon Plaintiffs' lack of standing.

III. Summary of Substantive Questions Presented

[2] Defendants contend that proper construction of the deed is dispositive of this case. They contend that the July and December deeds unambiguously conveyed the courthouse property to the County in fee simple. They contend that even if the December deed is ambiguous, the rule of construction that a deed is presumed to convey a fee simple unless an unequivocal intention by the grantor to convey a lesser estate than a fee simple compels finding of a fee simple interest in this case. They further contend that since the County received a fee simple interest in the courthouse property from the Packs, the County had an unlimited power of alienation of the courthouse property, including the Old County Jail Lot.

Plaintiffs argue that the courthouse property was dedicated to public use "as a park and as a site for a Court House and County Offices." Plaintiffs conflate the issues and the allegedly intended public uses of the courthouse property in both their complaint and their brief, but it appears that they contend that the courthouse property was dedicated to public use in one or more of three ways: (1) an express dedication when Pack made his offer of 31 December 1900 which was accepted by order to the County Commissioners on 7 January 1901, (2) an express dedication by the habendum clause of the December 1901 deed, or (3) an implied dedication on the basis of continual use by the public for over one hundred years.

IV. Standard of Review

The standard of review for summary judgment is well-settled:

Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the non-moving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

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In re Will of Jones, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citations and quotation marks omitted). Construction of deeds and contracts presents additional considerations on a motion for summary judgment which will be discussed in detail below. Based upon the offer and acceptance and the deeds, Plaintiffs and defendant Buncombe County both moved for summary judgment. Plaintiffs and defendant Black Dog Realty requested a declaratory judgment. Although the record presents some minor issues of fact, primarily regarding the exact time periods of usage of the Old County Jail Lot for a particular purpose, none of the issues of fact are material to the resolution of the legal issues.

We would also note that Defendants appealed from the trial court's order of 18 September 2008 denying their motion for written findings of fact and conclusions of law. Because the order of 15 September 2008 addressed only motions to dismiss and cross-motions for summary judgment, no written findings of fact or conclusions of law were required. Rule 52(a)(1) applies "[i]n all actions tried upon the facts" N.C. Gen. Stat. § 1A-1, Rule 52(a) (2007).

A motion for summary judgment is not an action tried upon the facts since this motion can only lie where there is no necessity for trying the action upon the facts. This rule does not require the trial court to make findings of fact when requested by a party in deciding a motion for summary judgment. The making of additional specific findings and separate conclusions on a motion for summary judgment is ill advised since it would carry an unwarranted implication that a fact question was presented.

Oglesby v. S.E. Nichols, Inc. by Noecker, 101 N.C. App. 676, 680, 401 S.E.2d 92, 95 (citation and quotation marks omitted), *disc. review denied*, 329 N.C. 270, 407 S.E.2d 839 (1991). "[E]ither on a motion to dismiss or a motion for summary judgment, it is not necessary or required for the trial court to enter conclusions of law, and that if such are entered, they are disregarded on appeal." *City of Charlotte v. Little-McMahan Properties, Inc.*, 52 N.C. App. 464, 469, 279 S.E.2d 104, 108 (1981) (citation omitted). The trial court therefore did not err by denying Defendants' motion for written findings of fact and conclusions of law on the order granting summary judgment.⁹

9. If the order had granted declaratory relief and an injunction upon a *bench trial*, and not upon summary judgment, the trial court would have been required to make findings of fact and conclusions of law, in accordance with N.C. Gen. Stat. § 1A-1, Rule 52(a) (1). *Appalachian Poster Advertising Co., Inc. v. Harrington*, 89 N.C. App. 476, 479, 366 S.E.2d 705, 707 (1988). In this particular case, a hearing on motions for sum-

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V. General Principles of Dedication

[3] All of Plaintiffs' claims are based upon the premise that either Pack, the County, or both, have irrevocably dedicated the courthouse property, including the Old County Jail Lot, to public use "as a park and as a site for a Court House and County Offices." "Dedication is a form of transfer whereby an individual grants to the public rights of use in his or her lands." *Kraft v. Town of Mt. Olive*, 183 N.C. App. 415, 418, 645 S.E.2d 132, 135 (2007).

Dedication is the intentional appropriation of land by the owner to some proper public use. More specifically, it has been defined as an appropriation of realty by the owner to the use of the public and the adoption thereof by the public,—having respect to the possession of the land and not the permanent estate.

Spaugh v. City of Charlotte, 239 N.C. 149, 159, 79 S.E.2d 748, 756 (1954) (citations and quotation marks omitted). "Dedication is an exceptional and peculiar mode of passing title to an interest in land [T]he courts will not lightly declare a dedication to public use." *State Highway Commission v. Thornton*, 271 N.C. 227, 233, 156 S.E.2d 248, 253 (1967) (citations and quotation marks omitted).

Dedication requires an offer by the owner and acceptance "on the part of the public in some recognized legal manner and by a proper public authority." *Kraft*, 183 N.C. App. at 420, 645 S.E.2d at 137 (citation and quotation marks omitted). The offer of dedication may be "in express terms or it may be implied from conduct on the part of the owner." *Spaugh*, 239 N.C. at 159, 79 S.E.2d at 756. Similarly, acceptance "in some recognized legal manner includes both express and implied acceptance." *Kraft*, 183 N.C. App. at 418, 645 S.E.2d at 135 (citation and quotation marks omitted). "Express acceptance can occur, *inter alia*, by a formal ratification, resolution, or order by proper officials, the adoption of an ordinance, a town council's vote of approval, or the signing of a written instrument by proper authorities." *Kraft*, 183 N.C. App. at 420-21, 645 S.E.2d at 137 (citation and quotation marks omitted). "Because North Carolina does not have statutory guidelines for dedicating streets to the public, the common law principles of offer and acceptance apply." *Tower Development Partners v. Zell*, 120 N.C. App. 136, 140, 461 S.E.2d 17, 20 (1995).

mary judgment and a bench trial on the merits probably would have been essentially the same, as a practical matter, except that the trial court relied upon affidavits and discovery at the summary judgment hearing, but would have relied upon testimony and exhibits presented during a bench trial.

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VI. Express Dedication by Offer and Acceptance

[4] The trial court based its order granting summary judgment upon the 31 December 1900 offer and the County's acceptance of that offer as creating an express dedication of the courthouse property. Thus, we first consider whether Pack's 31 December 1900 offer ("I offer to give to the County to be used for a site for a Court house and County offices . . .") and subsequent acceptance of the offer by the County's Board of Commissioners were sufficient to constitute dedication to public use.

The offer and acceptance were followed by a deed, which was executed on 24 July 1901. Therefore, we first note that the terms of a contract for the sale of land are generally "not enforceable when the deed fulfills all the provisions of the contract, since the executed contract then merges into the deed." *Biggers v. Evangelist*, 71 N.C. App. 35, 38, 321 S.E.2d 524, 526 (1984) (citing *Gerdes v. Shew*, 4 N.C. App. 144, 166 S.E.2d 519 (1969); 26 C.J.S. *Deeds* Sec. 91(c) (1956)), *disc. review denied*, 313 N.C. 327, 329 S.E.2d 384-85 (1985).

[I]t is well-recognized that the intent of the parties controls whether the doctrine of merger should apply. *Stewart v. Phillips*, 154 Ga. App. 379, 268 S.E.2d 427 (1980) (survival clause-no merger); *Bryant v. Turner*, 150 Ga. App. 65, 256 S.E.2d 667 (1979) (closing statement revealed intent not to merge); *Vaughey v. Thompson*, 95 Ariz. 139, 387 P.2d 1019 (1963), 8A G.W. Thompson, *Real Property* Sec. 4458 (1963 & Supp. 1981); Annot., 38 A.L.R.2d 1310 (1953).

Id. In this case, the offer and acceptance were not in the form of a contract for the sale and purchase of the courthouse property, but in the form of the offer to the Board to transfer the courthouse property in consideration of the Board's dedication of other land, Pack Square, to be used as a public park or square. Also, the offer and acceptance did not indicate any intent that the terms of the offer and acceptance would not merge into the deed. Ultimately, the July deed quoted the terms of the offer and noted that the Board had ordered that the offer be accepted. Therefore, the terms of the offer and acceptance were literally merged into the July deed, and the July deed then became the enforceable, operative document. The December deed did not mention the offer and acceptance or incorporate their terms. However, the trial court explicitly based its order granting summary judgment

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upon the terms of the offer and acceptance.¹⁰ Because the terms of the offer and acceptance were included in the July deed and because the trial court based its order upon these terms, we will first address the offer and acceptance.

“A contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court. If the agreement is ambiguous, however, interpretation of the contract is a matter for the jury.” *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 421-22, 547 S.E.2d 850, 852 (2001) (citations and quotation marks omitted). “Contracts are interpreted according to the intent of the parties. The intent of the parties is determined by examining the plain language of the contract. Extrinsic evidence may be consulted when the plain language of the contract is ambiguous.” *Brown v. Ginn*, 181 N.C. App. 563, 567, 640 S.E.2d 787, 789-90 (2007) (citations omitted), *disc. review denied*, 361 N.C. 350, 645 S.E.2d 766 (2007).

Taking these principles of contract interpretation together with the standard of review for summary judgment, when the language of a contract is not ambiguous, no factual issue appears and only a question of law which is appropriate for summary judgment is presented to the court. In the case *sub judice*, the intent of the parties is clear from the unambiguous words of the offer and the acceptance, hence the contract is ripe for judicial interpretation and summary judgment. *Liptrap v. Coyne*, — N.C. App. —, —, 675 S.E.2d 693, 696 (2009).

From the words of the offer, Pack’s intent was for the County to dedicate the land on which the old courthouse stood to be used as a park which would be dedicated to public use, now known as Pack Square. In exchange for the County’s dedication of the old courthouse site as a park (Pack Square), he offered to convey to the County land to be used for a new courthouse and county offices (the courthouse property). This was not an offer to dedicate the courthouse property to public use forever; it was merely an *offer to transfer* land to be used for a new courthouse and county offices *in exchange for the County’s dedication* of the land upon which the old courthouse then sat for use as a park and public square. Pack’s intent becomes even clearer from the second clause of the offer: “[T]he County will dedicate to the public forever to be used for the purpose of a public square park or place whatever land the County may own within the

10. We are unable to determine from the summary judgment order if the trial court was referring to the terms of the offer and acceptance as they were originally made or the same terms which were set forth in full in the July deed.

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limits of the public square so called, in Asheville, the present Court House, to be removed there from” Pack obviously knew the language required to unequivocally dedicate land to public use forever, and he used this language as to the land to be used as a public park, now Pack Square.¹¹ The fact that he did not use such language in referring to the courthouse property demonstrates that he did not intend to dedicate the courthouse property to public use “forever” as a site for a courthouse and county offices, although he did intend to convey it to the County to be used as a site for a new courthouse, as the old one was to be removed from the Pack Square property.

Therefore, even if the terms of the offer and acceptance were controlling over the July deed, the offer and acceptance did not create a permanent dedication of the courthouse property to public use as a site for a courthouse or as a public park. We conclude therefore that summary judgment in favor of Plaintiffs, insofar as it rested on the offer of 31 December 1900 and the acceptance of 7 January 1901, was error.

Although the trial court based its order upon express dedication by the offer and acceptance, which we have found to be in error, we must also consider whether the courthouse property was dedicated in some other manner, as the Plaintiffs contend.

If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered. *Sanitary District v. Lenoir*, 249 N.C. 96, 105 S.E.2d 411 (1958); *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1956).

Shore v. Brown, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). In addition, as noted above, the offer and acceptance were merged into the July deed, so we must consider the terms and effect of the July deed.

VII. Express Dedication Through the Deed

A. Standard of Review

[5] “The meaning of the terms of the deed is a question of law, not of fact.” *Mason-Reel v. Simpson*, 100 N.C. App. 651, 654, 397 S.E.2d 755,

11. As the County, not Pack, owned the Pack Square property, technically Pack himself would not have been able to “dedicate” Pack Square, but there is no issue in this case as to the dedication or use of the Pack Square property. We discuss it only because it was a part of the transaction at issue and the language used helps to demonstrate the intent of the parties as to the courthouse property.

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756 (1990) (citing *Brown v. Hodges*, 232 N.C. 537, 541, 61 S.E.2d 603, 606 (1950), *reh'g denied*, 233 N.C. 617, 65 S.E.2d 144 (1951)). Therefore, “[a]mbiguous deeds traditionally have been construed by the courts according to rules of construction, rather than by having juries determine factual questions of intent.” *Robinson v. King*, 68 N.C. App. 86, 89, 314 S.E.2d 768, 771, *disc. rev. denied*, 311 N.C. 762, 321 S.E.2d 144-45 (1984). Questions of law are reviewed *de novo* on appeal. *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

B. General Rules of Deed Construction

“In construing a conveyance executed after January 1, 1968, in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from all of the provisions of the instrument.” N.C. Gen. Stat. § 39-1.1(a) (2007). However, in construing deeds executed before 1 January 1968, the common law rules of deed construction apply to determine the intent of the parties. *See Whetsell v. Jernigan*, 291 N.C. 128, 133, 229 S.E.2d 183, 186 (1976) (citing N.C. Gen. Stat. § 39-1.1(a)). Because the deed *sub judice* was executed prior to 1 January 1968, we must apply the common law rules. *Id.*

In a case decided not long after execution of the deed *sub judice*, the North Carolina Supreme Court stated the rules of deed construction as follows:

There are well-settled rules adopted by the courts in construing doubtful or ambiguous expressions in deeds. Those which will aid us in the solution of the question presented are: (1) That the entire deed must be read, and such construction of particular clauses be adopted as will effectuate the intention of the parties as gathered from the whole instrument. (2) That such construction shall be adopted as will, if possible, give to every portion thereof effect. (3) That, when terms are used which are clearly contradictory, the first in order shall be given effect to the exclusion of the last. (4) That, when language is of doubtful meaning, that construction shall be put upon it which is most favorable to the grantee.

Murphy v. Murphy, 132 N.C. 360, 362, 43 S.E. 922, 922 (1903) (citations and quotations marks omitted). *Artis v. Artis*, 228 N.C. 754, 761, 47 S.E.2d 228, 232 (1948), modified *Murphy's* third rule of construction and elevated the granting clause, followed by the habendum

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clause and the warranty clause, above other language in the deed. 228 N.C. 754, 761, 47 S.E.2d 228, 232 (1948). According to *Artis*, “[t]he granting clause is the very essence of the contract.” *Id.* at 760, 47 S.E.2d at 232 (citation and quotation marks omitted). If the granting clause, the habendum clause, and the warranty clauses all convey a fee simple interest, any other language in the deed which may appear to limit the fee simple interest is of no effect. Our Supreme Court has stated the rule as follows: “[W]here the entire estate in fee simple, in unmistakable terms, is given the grantee in a deed, both in the granting clause and habendum, the warranty being in harmony therewith, other clauses in the deed, repugnant to the estate and interest conveyed, will be rejected.” *Artis*, 228 N.C. at 761, 47 S.E.2d at 232. Although this common law rule of construction has been criticized as elevating form over substance, this rule is “the settled law of this jurisdiction” for deeds executed prior to 1968 and has been “applied in numerous subsequent decisions by our Supreme Court.” *Hornets Nest Girl Scout Council, Inc. v. Cannon Foundation, Inc.*, 79 N.C. App. 187, 194, 339 S.E.2d 26, 31 (1986).

1. The July and December Deeds

As stated above, both Plaintiffs and Defendants make several arguments regarding terms contained in the habendum clause and waiver of conditions in the December deed. Plaintiffs contend that because the July deed “contain[ed] a right of reverter clause, upon the happening of any of several events, the July deed actually describes an estate in fee simple determinable, not in fee simple absolute.” Plaintiffs go on to note that “since the December deed waives the restrictions of the July deed and was purportedly executed in lieu of and as a substitute for the July deed, the language of the December deed will most likely affect the outcome of this matter.” Defendants argue that if the July deed did not convey a fee simple interest, the December deed effected “a release of the right of reverter and the waiver of all conditions subsequent, if any, in the July Deed.” However, if the July deed conveyed a fee simple absolute interest to the County, then the terms of the December deed are irrelevant as in December, and Pack would have had no ownership interest in the courthouse property. Plaintiffs make no argument and present no evidence that the County did not accept the July deed and therefore the County’s acceptance is presumed. See *Corbett v. Corbett*, 249 N.C. 585, 590, 107 S.E.2d 165, 169 (1959) (“Where a deed is executed and recorded, it is presumed that the grantee therein will accept the deed made for his benefit Such presumption will pre-

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vail in the absence of evidence to the contrary.”). Thus, we will first examine the terms of the July deed.

Where a deed contains express and unambiguous language of reversion or termination, that deed conveys a determinable fee or a fee on condition subsequent. *Station Associates, Inc. v. Dare County*, 350 N.C. 367, 371-72, 513 S.E.2d 789, 793 (1999) “The language of termination necessary to create a fee simple determinable need not conform to any set formula.” *Id.* 350 N.C. at 373, 513 S.E.2d at 794 (citations and quotation marks omitted). However, this Court has held:

When the granting clause in a deed . . . conveys an unqualified fee *and the habendum contains no limitation on the fee thus conveyed* and a fee simple title is warranted in the covenants of title, any additional clause or provision repugnant thereto . . . inserted in the instrument as a part of, or following the description of the property conveyed, or elsewhere *other than in the granting or habendum clause*, which tends to delimit the estate thus conveyed, will be deemed mere surplusage without force or effect.

Anderson v. Jackson County Bd. of Education, 76 N.C. App. 440, 446, 333 S.E.2d 533, 536 (1985) (citing *Oxendine v. Lewis*, 252 N.C. 669, 672, 114 S.E.2d 706, 709 (1960)), *disc. rev. denied*, 315 N.C. 586, 341 S.E.2d 22 (1986). *See also Blackwell v. Blackwell*, 124 N.C. 269, 270-71, 32 S.E. 676, 677 (1899) (Where the deed conveyed a fee simple interest, and the habendum clause contained no limitation on that fee, the court determined the last clause of the deed, conveying a life estate to a third party in the same property, to be “repugnant” to the fee granted and therefore void). Further, “[w]hen language creating a fee simple determinable and possibility of reverter is contained within the granting or habendum clause of a deed, this limitation on the fee simple interest is valid.” *King Associates, LLP v. Bechtler Development Corp.*, 179 N.C. App. 88, 94, 632 S.E.2d 243, 248 (2006) (citations omitted). “In contrast, where the granting and habendum clauses do not limit the fee simple interest, then any conditional language contained within a separate provision of the deed cannot create a valid fee simple determinable.” *Id.* at 94-95, 632 S.E.2d at 248 (citation and quotation marks omitted).

The granting clause of the July deed provides that Pack and Mrs. Pack “have bargained and sold and by these presents do bargain, sell and convey to [the Board of Commissions of the County] and their successors in office forever, a certain piece or parcel of land,” the

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courthouse property, which is then identified by reference to the deed to Pack and by a metes and bounds description. This granting clause conveys an unqualified fee simple interest to the County. *See Oxendine*, 252 N.C. at 672, 114 S.E.2d at 709 (the words “bargain, sell and convey unto the said party of the second part, and to her heirs and assigns forever” held to convey an unqualified fee).

We must then consider the habendum clause, which states: “To Have and to hold, the said lot or parcel of land, with all the appurtenances thereunto belonging unto the party of the second part and its successors in office forever.” The habendum clause also contains no limits on the fee simple interest granted to the County.

The habendum clause is followed by the warranty clause, which provides that “[Pack], for himself, his heirs and assigns, doth covenant to and with [the Board] and its successors in office that he is seized in fee simple of said lot or parcel of land and has good right to convey the same; that the same is free from all encumbrances, and that he will warrant and defend the same unto [the Board] and its successors, in office against the lawful claims of all persons forever.” Again, the warranty clause contains no limitation upon the interest conveyed. Thus, the granting clause, the habendum clause, and the warranty clause are all in agreement as to the interest conveyed, a fee simple which is not subject to any limitations or conditions.

All of the conditions which Plaintiffs argue create a fee simple determinable limitation with a possibility of reverter or a dedication to public use are contained after the three operative clauses of the deed as noted above. This language provides that the deed was made in accordance with Pack’s offer of 7 January 1901 to the Board, as discussed above, and then sets forth detailed conditions as to the time table for the removal of the old courthouse and the construction of the new courthouse, among other conditions. However, under the rules of construction applicable to this 1901 deed, because none of these conditions were included within the granting, habendum, or warranty clauses of the July deed, they are repugnant to the fee simple interest conveyed and therefore “mere surplusage without force or effect.” *Anderson*, 76 N.C. App. at 446, 333 S.E.2d at 536.

We therefore hold that by the July deed, Pack conveyed his entire fee simple absolute interest in the courthouse property to the County, and the additional language in the deed did not create any limitations or conditions upon the fee simple interest. Summary judgment in favor of Plaintiffs is in error insofar as it rests upon the language the

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July deed or the terms of the offer and acceptance contained within the July deed. Because Pack conveyed his whole interest in fee simple in the July deed, he had no remaining interest to convey in the December deed, making any language contained in the December deed irrelevant. Pack could not expressly dedicate the courthouse property or limit its use in any way by the December deed, regardless of its language, as he no longer had any interest in the courthouse property.¹² Therefore, summary judgment in favor of Plaintiffs, insofar as it rests upon the language of the December deed as grounds for an express public dedication, was also error. The trial court should have entered summary judgment in favor of Defendants on this issue.

VIII. Implicit Dedication

[6] Plaintiffs also argue that even if the offer and the acceptance or the language in the habendum clause of the December deed were ineffective to create a dedication to the public, an implicit dedication was created because Plaintiffs presented “undisputed evidence” that “the [courthouse property, including the Old County Jail Lot,]¹³ has been used for public purposes—primarily as a public park—for the last 107 years.”¹⁴

Just as with an express dedication, an implied dedication of property for public use requires “(1) an offer of dedication, and (2) an acceptance of this offer by a proper public authority.” *DOT v. Elm Land Co.*, 163 N.C. App. 257, 265, 593 S.E.2d 131, 137 (citation and quotation marks omitted), *disc. rev. denied*, 358 N.C. 542, 599 S.E.2d 42 (2004). For an implied dedication, the offer may arise from “conduct of the owner manifesting an intent to set aside land for the public.” *Id.* (citation and quotation marks omitted). “In either case,

12. However, we note that the December deed purported to release many of the alleged conditions of the July deed regarding the use of the courthouse property, so that if the December deed did have any effect, the result would be the same.

13. Despite the evidence in the record as to the County’s use of the Old County Jail Lot as a park for some long period of time, we suspect that the lot might have been used for a County Jail at some point in time. We also note that it is undisputed that the Buncombe County Courthouse and County Office Building are still located on a portion of the courthouse property which is still owned by the County. However, these factual issues are not material to our analysis.

14. The Old County Jail Lot was a part of the courthouse property, in front of the Courthouse and City Hall. In contrast to the plaintiff’s first arguments addressed above, that the courthouse property, including the Old County Jail Lot, was dedicated for purposes of a *courthouse*, in this argument, they claim that the implied dedication of the courthouse property, including the Old County Jail Lot, was for use as a *public park*.

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whether express or implied, it is the owner's intent to dedicate that is essential. *See, Milliken v. Denny*, 141 N.C. 224, 229-30, 53 S.E. 867, 869 (1906); *Nicholas v. Salisbury Hardware & Furniture Co.*, 248 N.C. 462, 468, 103 S.E.2d 837, 842 (1958).” *Id.*

When proving implied dedication, where no actual intent to dedicate is shown, the manifestation of implied intent to dedicate must clearly appear by acts which to a reasonable person would appear inconsistent and irreconcilable with any construction except dedication of the property to public use. In general it appears that an implicit intention may be demonstrated by: [1.]-The owner's use of the [dedicated property] as a boundary in a deed, as long as the use was not for descriptive purposes only. [2.]-The owner's affirmative acts respecting the property. [3.]-The owner's acquiescence in the public's use of the property, under circumstances indicating that the use was not permissive.

Wright v. Town of Matthews, 177 N.C. App. 1, 14, 627 S.E.2d 650, 660 (2006) (citations and quotation marks omitted).

Just as for an express dedication, the “intent of the owner” is the most important consideration as to implied dedication. In Plaintiffs' claims as to express dedication, they have argued that it was the intent of *Pack*, as the property owner who conveyed the courthouse property to the County, to dedicate the courthouse property for public use as a location for the *courthouse and county offices*.¹⁵ There is absolutely no evidence that *Pack* ever had any intent to dedicate the courthouse property for use as a *public park* which is independent of a courthouse or county offices. Thus, we must conclude that Plaintiffs are contending that it was the intent of the *County*, as the owner of the courthouse property since 24 July 1901, to dedicate the courthouse property, or at least that portion which was used for the City-County Plaza, for use as a public park. As an implied dedication requires both an offer for public use and “acceptance of this offer by a proper public authority,” Plaintiffs' theory of implied dedication would require the County to make an offer of dedication to itself and to accept its own offer. *See Elm Land Co.*, 163 N.C. App. at 265, 593 S.E.2d at 137.

15. Although we recognize that it is possible for a party to plead claims in the alternative, even including claims which may be contradictory to one another, Plaintiffs have not made alternative claims in this case but have alleged that the courthouse property was dedicated as *both* “a park and as a site for a Court House and County Offices.” As we realize that the public grounds surrounding a courthouse might be used in much the same manner as a public park, we do not necessarily consider these allegations completely contradictory.

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Even if we accept as true the Plaintiffs' allegations that the "[courthouse property] has been used for public purposes—primarily as a public park—for the last 107 years," a county is not bound to continue to use real property in a certain way just because it has used the property in that manner for any particular period of time. All real property owned by a county is by definition "dedicated to public use" simply by virtue of the fact that it is owned by a county. However, municipalities and counties have statutory authority to change the use of real property or to "sell or dispose of real . . . property, without regard to the method or purpose of its acquisition or to its intended or actual governmental or other prior use." N.C. Gen. Stat. § 160A-265 (2007). Our Supreme Court has described the limitations upon a city or county in changing the use of public property as follows:

Where property is dedicated or set apart without restriction merely for public uses, the municipal authorities may determine for what use it is appropriate and shall be used, and, *if not irrevocably dedicated or appropriated by them to any particular public use*, its use may be changed as the public convenience and necessities require. Where, however, property is purchased for the declared purpose of use as a public park or dedicated by gift for that purpose, or if acquired without any specific intent as to its use, has thereafter been *definitely set aside for the sole and specific use as a public park*, the governing authorities of a municipality may not, without legislative authority, dispose of the property or put it to an entirely different and inconsistent use.

....

A city may own property for which it has no present use, and permit it to be used temporarily for any legitimate purpose, or property devoted to a specific use may become unsuited for that purpose and a change of use become necessary, and it cannot be contended that every purpose for which it is thus used fixes its status irrevocably. If so, a city dump would remain a dump forever, though by reason of abutting development it became highly desirable for other purposes.

Wishart v. City of Lumberton, 254 N.C. 94, 96-97, 118 S.E.2d 35, 36-37 (1961) (internal citations, quotation marks omitted and emphasis added). Therefore, in order to avoid summary judgment dismissing their claim of implied dedication of the courthouse property to use as a public park, the Plaintiffs would have to show that the courthouse property was either (a) "irrevocably dedicated or appro-

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priated” for use as a public park; or (b) “purchased for the declared purpose of use as a public park or dedicated by gift for that purpose;” or (c) “acquired without any specific intent as to its use [but was] thereafter . . . definitely set aside for the sole and specific use as a public park[.]” *Id.* We have already rejected above Plaintiffs’ contentions that the courthouse property was expressly dedicated for a particular public use or that it was acquired for the “declared purpose” of a public park. *Id.* Plaintiffs have not forecast any evidence whatsoever that the courthouse property was “definitely set aside for the sole and specific use as a public park.” *Id.* We note that Plaintiffs’ brief recites the history of the use of the courthouse property since 1903, including a contention that

the [courthouse] property and the [Old County Jail Lot] were, in 1929, the subject matter of a contract between the City of Asheville and County of Buncombe to construct what is now known as City-County Plaza. In addition, on August 14, 2001, Buncombe County entered into an agreement with the Pack Square Conservancy to renovate City-County Plaza (including [the courthouse property] and [the Old County Jail Lot]) as a park.

However, the record on appeal does not include any contracts or agreements by and between the County, the City of Asheville, or Pack Square Conservancy, nor was such information presented to the trial court.

Pursuant to the North Carolina Rules of Appellate Procedure, our review is limited to what appears in the record on appeal. N.C. R. App. P. 9(a) (2007) (“review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9, and any items filed with the record on appeal pursuant to Rule 9(c) and 9(d)).

Estate of Redden ex rel. Morley v. Redden, — N.C. App. —, —, 670 S.E.2d 586, 589 (2009). Thus, based upon the record before us, Plaintiffs have not shown any evidence that the courthouse property or the Old County Jail Lot were “definitely set aside for the sole and specific use as a public park.” *Wishart*, 254 N.C. at 96, 118 S.E.2d at 36.

Counties are subject to specific requirements and limitations governing the sale of public property, *See* N.C. Gen. Stat. § 160A-266 et seq., but Plaintiffs here have not alleged that County did not follow

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proper statutory procedures in its sale of the Old County Jail Lot to Black Dog Realty. In fact, the deed to defendant Black Dog Realty indicates that the Board adopted a resolution to open the bidding process to sell the Old County Jail Lot, received bids, and accepted Black Dog Realty's bid which was the "last and highest bid." We therefore hold that the County, as a governmental entity, did not impliedly dedicate its own real property irrevocably to use as a public park solely by its use of a portion of the real property as a park for a particular period of time. Accordingly, the trial court erred by granting summary judgment in favor of Plaintiffs and should have granted summary judgment in favor of Defendants as to implied dedication.

IX. Conclusion

We affirm the trial court's denial of Defendants' motion to dismiss for want of standing and the trial court's order denying Defendants' motion for written findings of fact and conclusions of law. Summary judgment in favor of Plaintiffs on the basis of express or implied dedication of the courthouse property and the Old County Jail Lot to use as a site for a courthouse or county offices or a public park was in error and is reversed.

As there are no genuine issues of material fact and defendant Black Dog Realty is entitled to judgment as a matter of law quieting title to the Old County Jail Lot, the trial court should have granted summary judgment to Black Dog Realty as to its action to quiet title, and should have granted summary judgment in favor of both Defendants by way of declaratory judgment on all substantive issues. We therefore affirm in part, reverse in part, and remand for the entry of judgment consistent with this opinion.

Affirmed in part, Reversed in part and Remanded.

Chief Judge MARTIN and Judge BEASLEY concur.

FISCHER INV. CAPITAL, INC. v. CATAWBA DEV. CORP.

[200 N.C. App. 644 (2009)]

FISCHER INVESTMENT CAPITAL, INC., PLAINTIFF v. CATAWBA DEVELOPMENT CORPORATION, RIDGELINE REAL ESTATE CORPORATION, MARK W. LEWIS AND DEBRA D. LEWIS A/K/A DEBRA DOWNS LEWIS A/K/A DEBRA DOWNS, DEFENDANTS

No. COA08-1407

(Filed 3 November 2009)

1. Corporations— piercing corporate veil—instrumentality rule

The trial court erred by concluding that plaintiff's complaint failed to state a claim for piercing defendant's corporate veil because plaintiff's pleading asserted facts that, if proven to be true, would establish all the elements for piercing the corporate veil under the instrumentality rule.

2. Fraud— fraudulent transfer of real property

The trial court erred by concluding that plaintiff's complaint failed to state a claim for fraudulent transfer of property under N.C.G.S. §§ 39-23.4(a)(1) and 39-23.5(a) because the language of plaintiff's complaint tracked the relevant statutory language of N.C.G.S. § 39-23.4(a)(1) and plaintiff's complaint complied with the requirements of N.C.G.S. § 39-23.5(a).

Appeal by Plaintiff from judgment entered 28 July 2008 by Judge Dennis J. Winner in Buncombe County Superior Court. Heard in the Court of Appeals 22 April 2009.

Robinson, Bradshaw & Hinson, P.A., by Robert E. Harrington, for Plaintiff-Appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Michelle D. Rippon and Craig D. Justus, for Defendant-Appellees Ridgeline Real Estate Corporation and Debra D. Lewis.

ERVIN, Judge.

Fischer Investment Capital, Inc. (Plaintiff), appeals from judgment entered 28 July 2008 granting Defendants' motion to dismiss for failure to state a claim for which relief can be granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). After careful consideration of the allegations of Plaintiff's complaint in light of the applicable law, we reverse the trial court's order dismissing Plaintiff's complaint and remand this case to the Buncombe County Superior Court for further proceedings not inconsistent with this opinion.

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Factual Background

On 12 August 2005,¹ HCL Partnership, LLP (HCL), executed a promissory note in favor of Plaintiff in the original principal amount of \$400,000.00 (HCL Note). The HCL Note permitted future advances and provided for a 10 percent annual interest rate. Mark W. Lewis (Defendant Mark Lewis) personally guaranteed all obligations of HCL to Plaintiff under the HCL Note.

Between 12 August 2005 and March 2006, Plaintiff loaned a total principal amount of \$496,059.00 to HCL under the HCL Note. HCL was obligated to repay the original principal amount of \$400,000.00 plus \$40,000.00 in interest on or before 12 August 2006. HCL defaulted on its obligations to Plaintiff under the HCL Note by failing to make the required payment by 12 August 2006, resulting in the acceleration of its obligations under the HCL Note. Upon acceleration, HCL and its guarantors, including Defendant Mark Lewis, became obligated to pay the full amount owed under the HCL Note, including subsequent advances and interest.

On 16 September 2005, Catawba Development Corporation (Defendant Catawba), Defendant Mark Lewis, and others, as individual makers, executed a promissory note in the amount of \$785,000.00 in favor of Plaintiff (Grovestone Note). The Grovestone Note was secured by a deed of trust that applied to a 76.79 acre tract of property (Grovestone Property) that was located in Buncombe County and owned by Defendant Catawba. The Grovestone Note included the following provision:

9. SALE OF PREMISES: Grantor ["Catawba"] agrees that if the Premises or any part thereof or interest therein is sold, assigned, transferred, conveyed or otherwise alienated by Grantor . . . without the prior written consent of [Plaintiff], [Plaintiff], at its option, may declare the Note secured hereby and all other obligations hereunder to be forthwith due and payable.

The Grovestone Note was due in full on or before 16 March 2006.

At the time of the execution of the Grovestone Note, Defendant Mark Lewis owned 99 percent of the stock in Defendant Catawba and his wife, Debra Lewis (Defendant Debra Lewis), owned the remaining

1. The substantive facts recited in the text of this opinion are derived from the allegations of the Plaintiff's complaint, which must be taken as true for purposes of analyzing its sufficiency pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). *Barnaby v. Boardman*, 313 N.C. 565, 566, 330 S.E.2d 600, 601 (1985).

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1 percent. Defendant “Mark Lewis . . . operated [Defendant] Catawba in such a manner that [Defendant] Catawba [was] a mere instrumentality and the alter ego of [Defendant] Mark Lewis.” Among other things, Plaintiff alleged that Defendant Catawba failed to comply with required corporate formalities, that Defendant Catawba had been left insolvent as the result of a transfer that siphoned off all of Defendant Catawba’s assets for the benefit of Defendant Mark Lewis, and that no other corporate officer of Defendant Catawba aside from Defendant Mark Lewis had exercised any influence over the actions of Defendant Catawba.

Defendant Catawba and the other makers of the Grovestone Note defaulted on their obligations under that instrument by failing to make timely payment. As a result, Plaintiff retained an attorney for the purpose of foreclosing on the Grovestone Property under the deed of trust that secured the Grovestone Note. In December 2006, Defendant Mark Lewis informed Plaintiff that Catawba would “refinance” the Grovestone Note. At that time, Defendant Mark Lewis’ interest in Defendant Catawba and, through Defendant Catawba, in the Grovestone Property, was “one of [Defendant Mark Lewis’] few, if not his only, substantial personal asset[s].” Based upon representations made by Defendant Mark Lewis, Plaintiff believed that a transaction subsequently proposed by Defendant Mark Lewis “would be a refinancing of the Grovestone Note and would not involve a sale or conveyance of the Grovestone Property.” Defendant Mark Lewis never indicated to Plaintiff that Defendant Catawba intended to convey the Grovestone Property to a third party.

On 26 February 2007, the Grovestone Property was conveyed to Ridgeline Real Estate Corporation (Defendant Ridgeline) for \$1,200,000.00. Defendant Ridgeline is controlled by Defendant Debra Lewis, who is the corporate secretary of Defendant Catawba and the president and the sole or majority stockholder of Defendant Ridgeline. On or about 27 February 2007, Defendant Catawba, acting under the direction and control of Defendant Mark Lewis, made a payment to Plaintiff against its obligation under the Grovestone Note. However, since the proceeds from the sale of the Grovestone Property to Defendant Ridgeline were insufficient to fully satisfy Defendant Catawba’s debt to Plaintiff, Defendant Catawba, Defendant Mark Lewis, and two other individual makers executed a new unsecured note (Second Grovestone Note) in favor of Plaintiff in the principal amount of \$26,500.00 which was due on 27 August 2007.

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At the time that these transactions occurred, Defendant Mark Lewis was in default in his obligations to Plaintiff under the HCL Note. Plaintiff did not know that the Grovestone Property had been transferred to Defendant Ridgeline at the time of the execution and acceptance of the Second Grovestone Note. Had Plaintiff been aware of the conveyance of the Grovestone Property from Defendant Catawba to Defendant Ridgeline, Plaintiff would have foreclosed on the Grovestone Property, given Defendant Mark Lewis' obligation to Plaintiff under the HCL Note and the value of the Grovestone Property.

On 22 August 2007, Plaintiff mailed Defendant Lewis the original Grovestone Note and original deed of trust applicable to the Grovestone Property marked "satisfied" along with a letter from Plaintiff's attorneys demanding payment in full under the HCL Note and indicating that they had authority from Plaintiff to file suit against him on the guarantee in order to obtain payment of all principal, interest, attorneys' fees, and expenses due under that instrument. Defendant Mark Lewis refused to accept the certified mail package containing these items.

Plaintiff ultimately filed suit against Defendant Mark Lewis under the HCL Note. On 24 January 2008, a default judgment was entered against Defendant Mark Lewis in the United States District Court for the Western District of North Carolina in the principal amount of \$665,696.74, including attorneys' fees, plus continuing interest at the legal rate and the costs. Defendant Catawba and the individual makers ultimately defaulted on the Second Grovestone Note as well. On 25 January 2008, Plaintiff obtained a default judgment against Defendant Mark Lewis in the Yancey County Superior Court on the Second Grovestone Note in the principal amount of \$38,671.60, plus \$5,199.36 in attorneys' fees and continuing interest.

Procedural History

On 25 January 2008, Plaintiff filed a verified complaint in the Buncombe County Superior Court against Defendant Catawba, Defendant Mark Lewis, Defendant Ridgeline, and Defendant Debra Lewis² in which it requested the court to "set aside and declare void" the conveyance of the Grovestone Property from Defendant Catawba to Defendant Ridgeline on the grounds that Defendant Catawba's assets, including the Grovestone Property, should be made available

2. Plaintiff named Defendant Debra Lewis in a number of different and alternative ways in its complaint.

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to satisfy Defendant Mark Lewis' obligations to Plaintiff under the HCL note. In support of this contention, Plaintiff alleged that Defendant Catawba served as the alter ego of Defendant Mark Lewis, such that Defendant Catawba's separate corporate identity should be disregarded and the assets of Defendant Catawba treated as the personal assets of Defendant Mark Lewis. According to Plaintiff, such a result would be particularly appropriate given that Defendant Mark Lewis and Defendant Catawba had transferred the Grovestone Property to Defendant Ridgeline in violation of N.C. Gen. Stat. § 39-23.4(a)(1) and N.C. Gen. Stat. § 39-23.5(a). As a result, Plaintiff asserted claims against Defendant Catawba and Defendant Mark Lewis seeking the "piercing" of Defendant Catawba's "corporate veil" and against all Defendants for the purpose of having the transfer of the Grovestone Property set aside as a fraudulent transfer.

On 19 May 2008, Defendant Catawba and Defendant Mark Lewis filed an Answer and Counterclaim in which they sought the dismissal of Plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6); denied the material allegations of Plaintiff's complaint; asserted affirmative defenses predicated on alleged violations of N.C. Gen. Stat. § 53-243.02, accord and satisfaction, and the existence of a good faith transfer for value; and asserted a counterclaim alleging that, as a result of the "trifurcation" of the HCL Note, Defendant Mark Lewis had satisfied his obligations to Plaintiff under the HCL Note, rendering Plaintiff liable to Defendant Mark Lewis for abuse of process. On the same date, Defendant Debra Lewis and Defendant Ridgeline filed a motion to dismiss Plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). On 2 July 2008, Defendant Catawba and Defendant Mark Lewis filed an amended Answer and Counterclaim in which they withdrew their affirmative defense based on Plaintiff's alleged violation of N.C. Gen. Stat. § 53-243.02.

Defendants' dismissal motions came on for hearing before the trial court on or about 17 July 2008. Plaintiffs, Defendant Debra Lewis, and Defendant Ridgeline submitted briefs for the trial court's consideration.³ On 28 July 2008, the trial court entered a Judgment of Dismissal in which it concluded that "neither the Complaint nor the Counterclaim state a claim upon which relief can be granted and that the same are THEREFORE DISMISSED." On 26 August 2008, Plaintiff noted an appeal to this Court from the trial court's Judgment of Dismissal.

3. Throughout the remainder of this opinion, unless the context clearly indicates otherwise, "Defendants" refers to Defendant Debra Lewis and Defendant Ridgeline.

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Analysis

“On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted.” *Schlieper v. Johnson*, — N.C. App. —, —, 672 S.E.2d 548, 551 (2009). A complaint should be dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) when one of the following three conditions is satisfied: “(1) the complaint on its face reveals that no law supports the plaintiff’s claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff’s claim.” *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). “A complaint should not be dismissed under Rule 12(b)(6) . . . unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim.” *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985) (citation and quotation omitted).

In its complaint, Plaintiff alleged (1) that Defendant Catawba’s corporate veil should be pierced in order to allow Plaintiff to reach Defendant Catawba’s assets for the purpose of satisfying Defendant Mark Lewis’ obligation to Plaintiff under the HCL Note and (2) that the conveyance of the Grovestone Property from Defendant Catawba to Defendant Ridgeline should be set aside as a fraudulent transfer under N.C. Gen. Stat. §§ 39-23.4(a)(1) and 39-23.5(a) so as to enable Plaintiff to use the Grovestone Property to satisfy its claim against Defendant Mark Lewis under the HCL Note. In order for Plaintiff to reach the Grovestone Property to obtain satisfaction of Defendant Mark Lewis’ personal obligations to Plaintiff under the HCL Note, Plaintiff would have to prevail on both claims or obtain nothing of any practical benefit.

I: Piercing the Corporate Veil

[1] First, we address Plaintiff’s contention that the trial court erred by concluding that Plaintiff failed to allege a claim for the “piercing” of Defendant Catawba’s “corporate veil.” “[C]ourts will disregard the corporate form or ‘pierce the corporate veil,’ and extend liability for corporate obligations beyond the confines of a corporation’s separate entity, whenever necessary to prevent fraud or to achieve equity.” *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985) (citation omitted). “In North Carolina, what has been commonly referred to as the ‘instrumentality rule,’ forms the basis for disregarding the

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corporate entity or ‘piercing the corporate veil.’ ” *Wagner*, 313 N.C. at 454, 329 S.E.2d at 330. The “instrumentality rule” has been described as follows:

“[A] corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such instances, the separate identities of parent and subsidiary or affiliated corporations may be disregarded.”

Id. (quoting *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 8, 149 S.E.2d 570, 575 (1966)). We approved “reverse piercing,” the strategy that Plaintiff seeks to utilize here, in *Strategic Outsourcing, Inc. v. Stacks*, 176 N.C. App. 247, 254, 625 S.E.2d 800, 804 (2006), in which we stated that, “where one entity is the alter-ego, or mere instrumentality, of another entity, shareholder, or officer, the corporate veil may be pierced to treat the two entities as one and the same, so that one cannot hide behind the other to avoid liability.”

An attempt to pierce the corporate veil under the “instrumentality rule” requires the successful plaintiff to establish three things:

- (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
- (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff’s legal rights; and
- (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

B-W Acceptance Corp., 268 N.C. at 9, 149 S.E.2d at 576 (citation omitted). Among the factors that have been considered under the rubric of the first, or “control,” element of the “instrumentality rule” are the following:

1. Inadequate capitalization (“thin incorporation”).
2. Non-compliance with corporate formalities.
3. Complete domination and control of the corporation so that it has no independent identity.

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4. Excessive fragmentation of a single enterprise into separate corporations.

East Mkt. St. Square, Inc. v. Tycorp Pizza IV, Inc., 175 N.C. App. 628, 636, 625 S.E.2d 191, 198 (2006). “[T]he presence or absence of any particular factor . . . is [not] determinative.” *Tycorp Pizza IV, Inc.*, 175 N.C. App. at 636, 625 S.E.2d at 198. “Rather, it is a combination of factors which . . . suggest that the corporate entity attacked had ‘no separate mind, will or existence of its own’ and was therefore the ‘mere instrumentality or tool’ of the dominant corporation.” *Id.*, 175 N.C. App. at 636, 625 S.E.2d at 198 (quoting *Wagner*, 313 N.C. at 458, 329 S.E.2d at 332). Thus, the issue raised by this portion of Plaintiff’s challenge to the trial court’s Judgment of Dismissal is whether Plaintiff’s complaint alleged facts that would, if believed, tend to establish all three elements of the “instrumentality rule.”

In its complaint, Plaintiff made the following allegations in support of its request for the “piercing” of Defendant Catawba’s “corporate veil”:

33. Mark Lewis has operated Catawba in such a manner that Catawba is a mere instrumentality and the alter ego of Mark Lewis.
34. On information and belief, Mark Lewis owns approximately 99% of the stock of Catawba, and his wife, Debra Lewis, owns the remaining 1% of the stock of Catawba.
35. The corporate form of Catawba should be disregarded to permit Fischer to reach the assets of Catawba (and to set aside the fraudulent transfer of the Grovestone Property from Catawba to Ridgeline) to satisfy the debt of Mark Lewis. Facts supporting disregarding the corporate form of Catawba, or piercing the corporate veil of Catawba, include, but are not limited to the following:
 - a. Mark Lewis has completely dominated and controlled Catawba by, *inter alia*, transferring the assets of Catawba (including, but not necessarily limited to, the Grovestone Property) to Ridgeline shortly after HCL defaulted on its obligation to Fischer under the HCL Note, on which Mark Lewis is obligated as guarantor;
 - b. Mark Lewis has completely dominated and controlled Catawba by transferring assets of Catawba to a corporation controlled by Mark Lewis’s wife, Debra Downs;

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- c. Catawba has failed to file annual reports with the North Carolina Secretary of State's office and, on information and belief, has otherwise failed to comply with corporate formalities;
 - d. On information and belief, Catawba's conveyance of the Grovestone Property to Ridgeline has left Catawba insolvent;
 - e. Mark Lewis's conduct in causing Catawba to transfer its assets to Ridgeline, a corporation controlled by Debra Lewis, has resulted in the siphoning off assets of Catawba for the benefit of Mark Lewis, an officer, director, and the dominant shareholder of Catawba; and
 - f. No other officer or director of Catawba other than Mark Lewis has exercised any control or function in connection with the conveyance of the Grovestone Property to Ridgeline, or, on information and belief, in connection with the other activities of Catawba.
36. Mark Lewis has used his control of Catawba to transfer the Grovestone Property from Catawba to Ridgeline, and, on information and belief, in other ways, for the purpose of defrauding his creditors and the creditors of Catawba, including Fischer.
37. Mark Lewis's control of Catawba and, in particular, his conduct in causing Catawba to transfer the Grovestone Property to Ridgeline, has proximately caused injury to Fischer in that Fischer has been hindered in reaching Mark Lewis's interest in the Grovestone Property.
38. Injustice will result to Fischer if Mark Lewis is allowed to operate Catawba as his instrumentality, *inter alia*, by conveying Catawba's substantial assets to a corporation controlled by Mark Lewis's wife for the purpose of avoiding payment of his debt to Fischer.

After carefully analyzing these allegations, which must be taken as true for purposes of analyzing the extent to which they are sufficient to survive a dismissal motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), *Barnaby*, 313 N.C. at 566, 300 S.E.2d at 601, we conclude that Plaintiff has alleged sufficient facts to state a claim for relief as to whether Defendant Catawba's corporate veil should be

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pierced. We reach this conclusion by juxtaposing the allegations of Plaintiff's complaint against the three components of the "instrumentality rule."

First, Plaintiff has alleged that Defendant Lewis "completely dominated and controlled Catawba" by "transferring the assets of Catawba (including, but not necessarily limited to, the Grovestone Property) to Ridgeline shortly after HCL defaulted on its obligation to Fischer;" that Defendant Catawba "failed to file annual reports with the North Carolina Secretary of State's office;" and that "Catawba's conveyance of the Grovestone Property to Ridgeline has left Catawba insolvent." These allegations provide adequate support for a conclusion that Defendant Mark Lewis exercised "complete domination, not only of finances, but of policy and business practice[s] . . . so that the corporate entity . . . had . . . no separate mind, will or existence of its own." *B-W Acceptance Corp.*, 268 N.C. at 9, 149 S.E.2d at 576. More particularly, the allegations of Plaintiff's complaint address three of the four factors relevant to the "control" component of the "instrumentality rule" set out in *Tycorp Pizza IV, Inc.*, 175 N.C. App. at 636, 625 S.E.2d at 198: "inadequate capitalization"; "non-compliance with corporate formalities"; and "complete domination and control of the corporation so that it has no independent identity." As a result, the allegations of Plaintiff's complaint are more than sufficient to satisfy the requirements for pleading the first component of the "instrumentality rule[.]"

With respect to the second, or "improper purpose," component of the "instrumentality rule," Plaintiff's complaint alleges that "Mark Lewis has used his control of Catawba to transfer the Grovestone Property from Catawba to Ridgeline . . . for the purpose of defrauding his creditors and the creditors of Catawba, including Fischer." This part of Plaintiff's complaint clearly alleges that Defendant Mark Lewis used his control over Defendant Catawba "to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights." *B-W Acceptance Corp.*, 268 N.C. at 9, 149 S.E.2d at 576.⁴

4. Defendant Debra Lewis and Defendant Ridgeline argue that Plaintiff's complaint fails to adequately allege facts supporting the second component of the "instrumentality rule" because Plaintiff failed to allege that any fraudulent conduct engaged in by Defendant Mark Lewis or Defendant Catawba bore any relation to the HCL Note. Assuming, without in any way deciding, that there is any required nexus between the HCL Note and the conduct of Defendant Mark Lewis or Defendant Catawba, we believe that Plaintiff's allegations that Defendant Mark Lewis' use of "his control of Catawba to transfer the Grovestone Property from Catawba to Ridgeline . . . for the purpose of

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In addition, contrary to Defendants' description of Plaintiff's allegations of fraud as impermissibly conclusory, we believe that Plaintiff has adequately explained the exact nature of the fraudulent conduct in which it contends that the Defendants allegedly engaged. As a result, the allegations of Plaintiff's complaint are sufficient to satisfy the second, or "improper purpose," component of the "instrumentality rule" as well.

Finally, Plaintiff's complaint alleged that Defendant "Mark Lewis's control of Catawba and, in particular, his conduct in causing Catawba to transfer the Grovestone Property to Ridgeline, has proximately caused injury to Fischer in that Fischer has been hindered in reaching Mark Lewis's interest in the Grovestone Property." Once again, Plaintiff has clearly alleged in its complaint that "[t]he aforesaid control and breach of duty . . . proximately cause[d] the injury or unjust loss complained of." *B-W Acceptance Corp.*, 268 N.C. at 9, 149 S.E2.d at 576. As a result, we conclude that Plaintiff's complaint sufficiently alleges facts supporting the third and final element of the "instrumentality rule" as well.

In defending the trial court's Judgment of Dismissal, Defendant Debra Lewis and Defendant Ridgeline advance several arguments that have not been addressed above, including contentions that the effect of recognizing Plaintiff's theory is to impose liability for the HCL Note on Catawba in a manner that is inconsistent with a number of prior decisions of the North Carolina appellate courts and that North Carolina does not or, in the alternative, should not recognize "reverse veil piercing" outside the personal jurisdiction context. We do not find these arguments persuasive.

In support of their first argument, Defendants cite the decision of this Court in *Statesville Stained Glass, Inc. v. T.E. Lane Construction & Supply Co.*, 110 N.C. App. 592, 430 S.E.2d 437 (1993), for the proposition that "the piercing of the corporate veil of a construction company" was not appropriate when the corporation in question "had not contracted to do the work complained of by the plaintiff." In other words, it appears that Defendants read *Statesville Stained Glass* as precluding piercing of the veil of any corporation

defrauding his creditors and the creditors of Catawba, including Fischer" and that the transfer of the Grovestone Property from Catawba to Ridgeline had "proximately caused injury to Fischer in that Fischer has been hindered in reaching Mark Lewis' interest in the Grovestone Property" adequately allege a substantial nexus between any fraudulent conduct on the part of Defendant Mark Lewis and Defendant Catawba on the one hand and the HCL Note on the other.

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that is not directly involved in the transaction from which the underlying claim arises. However, a careful reading of *Statesville Stained Glass* establishes that the Court actually held that the plaintiff had failed to adduce sufficient evidence to support piercing the corporate veil between the individual defendant and a dissolved corporation and that a new corporation was not a successor to, and therefore liable for the debts of, the dissolved corporation. As a result, the claims asserted by the plaintiff in *Statesville Stained Glass* failed because the plaintiff failed to provide sufficient evidentiary support for them, not because those claims were not cognizable under North Carolina law.

In addition, Defendants place considerable reliance on *Cherry v. State Farm Mutual Automobile Insurance Co.*, 162 N.C. App. 535, 590 S.E.2d 925 (2004). In *Cherry*, the plaintiff, who had initiated a related wrongful death action, sought a declaration that a defendant in that wrongful death action was covered under a corporate automobile liability insurance policy using a “veil piercing” theory. In refusing to “disregard [the corporation’s] separate corporate identity under the doctrine of piercing the corporate veil for the purpose of reaching State Farm’s coverage,” this Court stated that “[g]ranted plaintiff’s request would be tantamount to rewriting the terms of the subject policy by requiring State Farm . . . to cover someone other than the named insured;” that “[p]laintiffs have cited no authority supporting the application of piercing the corporate veil in this manner[;]” and that “we decline to adopt it.” *Cherry*, 162 N.C. App. 539, 590 S.E.2d 929. After carefully reviewing *Cherry*, we do not believe that it is controlling on the present facts, which are very different from those before the Court in *Cherry*.

Had the Court approved the “veil piercing” proposed in *Cherry*, the effect of that decision would have been to expand the liability of State Farm even though State Farm was not in any way involved in the conduct that allegedly supported the piercing of the corporate veil or in any alleged fraudulent transfer. The same cannot be said about the present set of circumstances, in which all of the Defendants, either directly or indirectly, are alleged to have been involved in the conduct which forms the basis for Plaintiff’s claim that Defendant Catawba conveyed the Grovestone Property to Defendant Ridgeline for the purpose of helping to defeat the claim of Defendant Mark Lewis’ creditors. Thus, we do not believe that *Cherry* provides any basis for refusing to recognize the “veil piercing” claim that Plaintiff has sought to assert in this case.

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As a result, we are not persuaded that Plaintiff's claim amounts to an impermissible attempt to make Defendant Catawba liable for the HCL Note despite the fact that Catawba is not a party to that instrument. Instead, what Plaintiff is attempting to accomplish is, by means of allegations that we will consider in more detail below, (1) to have the transfer of the Grovestone Property from Defendant Catawba to Defendant Ridgeline set aside as a fraudulent transfer and (2) to have the "corporate veil" between Defendant Mark Lewis and Defendant Catawba "pierced" in order to make the assets of Defendant Catawba available to satisfy Defendant Mark Lewis' obligations.⁵ Given Plaintiff's reliance on this theory, we are not persuaded that the fact that Catawba did not participate in the making of the HCL Note has any relevance to Plaintiff's ability to maintain the present action. Similarly, given the theory that Plaintiff has adopted, the fact that Plaintiff initially chose to do business with HCL and Defendant Mark Lewis rather than with Defendant Catawba does not constitute such an insurmountable barrier to the maintenance of the present action as to require its dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Although the economic effect of the approach that Plaintiff espouses may be similar to subjecting Defendant Catawba to liability on the HCL Note, the two legal theories are not the same, since Plaintiff would not be able to reach Catawba's assets to satisfy Defendant Mark Lewis' obligations under the HCL Note unless it is able to establish that Defendant Catawba's corporate veil should be disregarded. As a result, we are not persuaded by Defendants' first argument in support of the trial court's Judgment of Dismissal.

Secondly, Defendants argue that "reverse veil piercing" has not been recognized except for the purpose of establishing personal jurisdiction and that we "should reject extending the doctrine of 'piercing' as a substantive basis for claims imposing obligations in reverse." We do not find any support for Defendants' argument in the

5. Defendants contend that Plaintiff should be relegated to attempting to obtain satisfaction of Defendant Mark Lewis' obligation under the HCL Note by executing on his interest in Defendant Catawba rather than by taking Defendant Catawba's assets directly. However, Defendants have cited no North Carolina authority in support of this argument, and we know of no reason why Plaintiff's options should be limited in this fashion given this jurisdiction's prior approval, as is discussed in more detail below, of "reverse veil piercing." We are particularly loath to accept this argument while evaluating the appropriateness of a dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) given Plaintiff's allegations that Defendant Mark Lewis' interest in Defendant Catawba is worthless and that Defendant Catawba, at a time when it was under the domination of Defendant Mark Lewis, transferred its most valuable asset for the purpose of hindering the ability of Defendant Mark Lewis' creditors to obtain payment.

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relevant decisions. Although both *Rose's Stores, Inc. v. Padgett* and *Strategic Outsourcing* arose in the context of a dispute over personal jurisdiction issues, it is clear from an examination of our opinions in those cases that the theory upon which we sustained an assertion of personal jurisdiction over the corporate defendant was identical to the substantive legal theory upon which the plaintiff relied. In other words, neither *Padgett* nor *Strategic Outsourcing* makes the distinction between the personal jurisdiction context and the substantive liability context upon which Defendants rely, necessitating a conclusion that "reverse veil piercing is a recognized legal theory in North Carolina for substantive as well as jurisdictional purposes. R. Robinson, 1-2 *Robinson on North Carolina Corporation Law* § 2.10[1] (2007) ("Occasionally, a 'reverse piercing' of the corporate entity may be allowed to make the assets of the entity available to pay the personal debts of the owner"). In addition, even if some doubt about the availability of "reverse veil piercing" for substantive as well as jurisdictional purposes remained, we do not find the logic adopted in *Postal Instant Press, Inc. v. Kaswa Corporation*, 162 Cal. App. 4th 1510, 1523, 77 Cal. Rptr. 3d 96, 101 (2008), to the effect that "reverse veil piercing" is unnecessary since "the corporate form is not being used to evade a shareholder's personal liability because the shareholder did not incur the debt through the corporate guise and misuse the guise to escape personal liability for the debt" persuasive since our California colleagues' logic ignores the possibility that the individual used the corporation to shelter personal assets rather than the other way around. As a result, we are not persuaded by Defendants' contentions that "reverse veil piercing" is not a recognized substantive claim in North Carolina and that we should refuse to recognize it as one for policy reasons.

Thus, for all of these reasons, we conclude that Plaintiff's complaint alleges sufficient facts to state a claim for piercing Catawba's corporate veil, since its pleading asserts facts that, if proven to be true, would establish all the elements of the "instrumentality rule" utilized in this jurisdiction to determine whether the corporate veil should be pierced. See *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 184 N.C. App. 613, 646 S.E.2d 790 (2007), *rev'd in part on other grounds by*, 362 N.C. 431, 666 S.E.2d 107 (2008). As a result, we conclude that the trial court erred in concluding that Plaintiff's complaint failed to state a claim for piercing Defendant Catawba's corporate veil.

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II: Fraudulent Transfer

[2] Next, we address Plaintiff's contention that the trial court erred by concluding that Plaintiff's complaint failed to state a claim to the effect that the conveyance of the Grovestone property from Defendant Catawba to Defendant Ridgeline should be set aside as a fraudulent transfer pursuant to N.C. Gen. Stat. §§ 39-23.4(a)(1) and 39-23.5(a). Although Defendants contend that the transfer of the Grovestone Property from Defendant Catawba to Defendant Ridgeline was one component of a larger transaction that was intended to benefit, rather than harm, Plaintiff, such a contention does not obviate the necessity for a thorough review of the allegations set out in Plaintiff's complaint in light of the applicable law. After completing such a review, we conclude that the allegations of Plaintiff's complaint suffice to state a claim for fraudulent transfer under both statutory theories.⁶

N.C. Gen. Stat. § 39-23.4(a)(1)

N.C. Gen. Stat. § 39-23.4 provides, in pertinent part, that:

- (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
 - (1) With intent to hinder, delay, or defraud any creditor of the debtor;

. . . .

6. Defendants argue that, having accepted "more than \$1 million in cash together with the unsecured [Second] Grovestone Note in complete satisfaction of the [Grovestone] Note and Grovestone deed of trust," Plaintiff "should now be estopped on the face of the complaint to question the integrity of Catawba and the transfer to Ridgeline after accepting the benefits of negotiating with Catawba for favorable terms under the [Grovestone] Note and the [Second Grovestone] Note." Although a complaint may be dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on estoppel grounds, *Shell Island Homeowners Asso., Inc. v. Tomlinson*, 134 N.C. App. 217, 226, 517 S.E.2d 406, 413 (1999), we do not believe that the principle that " 'a party will not be allowed to accept benefits which arise from certain terms of a contract and at the same time deny the effect of other terms of the same agreement,' " *Brooks v. Hackney*, 329 N.C. 166, 173, 404 S.E.2d 854, 859 (1991) (quoting *Capital Outdoor Advertising, Inc. v. Harper*, 7 N.C. App. 501, 505, 172 S.E.2d 793, 795 (1970)), requires dismissal of Plaintiff's complaint in this case since we are not convinced that the relief Plaintiff seeks necessarily violates the principle in question. However, we recognize that this "estoppel by benefit issue" may well recur and that Defendants retain the right to advance an "estoppel by benefits" claim, with the applicability and effect of that legal doctrine to be determined at subsequent stages of this proceeding.

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- (b) In determining intent under subdivision (a)(1) of this section, consideration may be given, among other factors, to whether:
- (1) The transfer or obligation was to an insider;
 - (2) The debtor retained possession or control of the property transferred after the transfer;
 - (3) The transfer or obligation was disclosed or concealed;
 - (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
 - (5) The transfer was of substantially all the debtor's assets;

. . . .

- (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) The transfer occurred shortly before or shortly after a substantial debt was incurred;

N.C. Gen. Stat. § 39-23.4. In seeking to assert a claim pursuant to N.C. Gen. Stat. § 39-23.4(a)(1), Plaintiff's complaint alleged that:

43. Mark Lewis and Catawba, as his instrumentality, transferred the Grovestone Property to Ridgeline fraudulently, and with the intent to hinder, delay, and defraud Fischer, as a creditor of Mark Lewis, in violation of N.C. [Gen. Stat.] § 39-23.4(a)(1).
44. The following factors, among others enumerated in N.C. [Gen. Stat.] § 39-23.4(b), support the determination that Mark Lewis and Catawba fraudulently transferred the Grovestone Property to Ridgeline in violation of N.C. [Gen. Stat.] § 39-23.4(a)(1):
 - a. Mark Lewis and Catawba misrepresented and otherwise concealed the nature of the Grovestone Property transaction with Ridgeline from Fischer;
 - b. The Grovestone Property constituted all or substantially all of the assets of Catawba, through Catawba, of Mark Lewis;
 - c. Mark Lewis and Catawba transferred the Grovestone Property to Ridgeline shortly after HCL defaulted on the HCL Note on which Mark Lewis is liable as a guarantor;

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- d. Mark Lewis and Catawba transferred the Grovestone Property to Ridgeline at the time that Mark Lewis became obligated to Fischer on the Second Grovestone Note;
- e. The transfer of the Grovestone Property from Catawba to Ridgeline should be deemed a transfer to an “insider” in that Ridgeline is controlled by Debra Lewis, who is Mark Lewis’s wife and the secretary of Catawba;
- f. On information and belief, Mark Lewis has retained functional control over the Grovestone Property after its transfer from Catawba to Ridgeline;
- g. Before Mark Lewis and Catawba transferred the Grovestone Property to Ridgeline, Fischer had threatened Lewis with suit on the HCL Note;
- h. Before Mark Lewis and Catawba transferred the Grovestone Property to Ridgeline, Fischer had threatened Lewis with foreclosure on the Grovestone Deed of Trust;
- i. On information and belief, the value of the consideration actually received by Catawba from Ridgeline for the Grovestone Property was not reasonably equivalent to the value of the Grovestone Property; and
- j. On information and belief, Catawba was insolvent when it transferred the Grovestone Property to Ridgeline, or Catawba became insolvent shortly thereafter.

The language of Plaintiff’s complaint, which alleges that Defendant Mark Lewis and Defendant Catawba,⁷ “as his instrumentality, transferred the Grovestone Property to [Defendant] Ridgeline fraudulently, and with the intent to hinder, delay, and defraud [Plaintiff], as a creditor of [Defendant] Mark Lewis,” tracks the relevant statutory language almost verbatim. In addition, Plaintiff’s complaint alleges facts supporting several of the more specific factors enumerated in N.C. Gen. Stat. § 39-23.4(b), including: (1) that Defendants concealed

7. Although Defendants correctly note that only a “debtor” as defined in N.C. Gen. Stat. §39-23.1(6) (defining a “debtor” as “a person who is liable on a claim”) can be the subject of a fraudulent transfer action, Plaintiff’s complaint alleges that Defendant Catawba was essentially Defendant Mark Lewis’ alter ego and that Defendant Catawba’s assets should be made available for the purpose of satisfying Plaintiff’s claims against Defendant Mark Lewis. For that reason, we do not believe, given the unusual facts present here, that the fact that Defendant Catawba was directly indebted to Plaintiff on the HCL Note precludes it from being a “debtor” as defined in N.C. Gen. Stat. § 39-23.1(6) in the event that it is, in fact, an alter ego of Defendant Mark Lewis.

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the nature of the transfer; (2) that the property was “all or substantially all” of the assets owned by Defendant Catawba and Defendant Mark Lewis; (3) that Defendant Mark Lewis had been threatened with foreclosure on the deed of trust applicable to the Grovestone Property and with the filing of a civil suit as a result of his default on the HCL Note; (4) and that Defendant Catawba “was insolvent when it transferred the Grovestone Property to Ridgeline, or Catawba became insolvent shortly thereafter.” Furthermore, given the allegation that, “on information and belief, the value of the consideration actually received by Catawba from Ridgeline for the Grovestone Property was not reasonably equivalent to the value of the Grovestone Property,” we do not believe that Plaintiff’s claim based on N.C. Gen. Stat. § 39-23.4(a)(1) is subject to dismissal for failure to state a claim based on the protections available to a “person who took in good faith and for a reasonably equivalent value” pursuant to N.C. Gen. Stat. 39-23.8(a). As a result, we conclude that Plaintiff’s complaint alleges sufficient facts to state a claim for fraudulent transfer pursuant to N.C. Gen. Stat. § 39-23.4(a)(1) and that the trial court erred by determining that Plaintiff’s complaint failed to do so.⁸

N.C. Gen. Stat. § 39-23.5(a)

Finally, N.C. Gen. Stat. § 39-23.5 provides that:

- (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

In support of its attempt to assert a fraudulent transfer claim pursuant to N.C. Gen. Stat. § 39-23.5, Plaintiff alleged in its complaint that:

8. Defendants argue that Ridgeline is not an “insider” as that term is defined in N.C. Gen. Stat. 39-23.1(7). Given that Ridgeline’s status as an “insider” is not critical to the viability of Plaintiff’s attempt to allege a claim pursuant to N.C. Gen. Stat. § 39-23.4(a)(1), N.C. Gen. Stat. § 39-23.4(b) (stating that “[i]n determining intent under subdivision (a)(1) of this section, consideration may be given, among other factors, to” the following criteria), we express no opinion at this time as to whether Plaintiff’s allegations, if supported by sufficient evidence, would permit a finding that the transfer of the Grovestone Property from Defendant Catawba to Defendant Ridgeline would constitute a transfer to an “insider” as alleged in Plaintiff’s complaint.

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47. [Plaintiff's] claim against Mark Lewis, who controlled and dominated the operation of Catawba and operated Catawba as his alter ego, arose before the transfer of the Grovestone Property by Catawba and Mark Lewis to Ridgeline.
48. On information and belief, Catawba and Mark Lewis made the transfer of the Grovestone Property to Ridgeline without Catawba's receiving a reasonably equivalent value in exchange for the transfer from Ridgeline.
49. Accordingly, Mark Lewis and Catawba, as his instrumentality, transferred the Grovestone Property to Ridgeline, in violation of N.C. [Gen. Stat.] § 39-23.5(a).
50. Fischer is entitled to the remedies set forth in [N.C. Gen. Stat. §] 39-23.7, including avoidance of the transfer of the Grovestone Property from Catawba to Ridgeline to the extent necessary to satisfy Fischer's claim on the HCL Note; an injunction against any further transfer of the Grovestone Property; and an Order permitting Fischer to execute against the Grovestone Property to satisfy the debt on the HCL Note and the Second Grovestone Note, as they have been reduced to judgment.

As required by N.C. Gen. Stat. § 39-23.5(a), Plaintiff's complaint alleged that "Fischer's claim against Mark Lewis . . . arose before the transfer of the Grovestone Property by Catawba and Mark Lewis to Ridgeline." In addition, as is also required by N.C. Gen. Stat. § 39-23.5(a), Plaintiff's complaint alleged that "Catawba and Mark Lewis made the transfer of the Grovestone Property to Ridgeline without Catawba's receiving a reasonably equivalent value in exchange for the transfer." Having previously alleged that "Catawba was insolvent when it transferred the Grovestone Property to Ridgeline" or that "Catawba became insolvent shortly thereafter"; that "Catawba's conveyance of the Grovestone Property to Ridgeline has left Catawba insolvent"; and that Defendant "Mark Lewis' interest in Catawba and, through Catawba, in the Grovestone Property, was one of his few, if not his only, substantial personal asset[s]," Plaintiff's complaint complied with the requirement that a claim advanced pursuant to N.C. Gen. Stat. § 39-23.5(a) include a showing that "the debtor [be] insolvent at [the time of the transfer] or [that] the debtor became insolvent as a result of the transfer or

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obligation.”⁹ Thus, we conclude that Plaintiff’s complaint alleges facts sufficient to state a claim for a fraudulent transfer pursuant to N.C. Gen. Stat. § 39-23.5(a). As a result, the trial court erred by dismissing Plaintiff’s claim under N.C. Gen. Stat. § 39-23.5(a) and pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

Conclusion

A careful review of the allegations of Plaintiff’s complaint establishes that Plaintiff adequately pled each of the three claims that it attempted to assert against Defendants. For that reason, the trial court erred by dismissing Plaintiff’s complaint for failure to state a claim for which relief could be granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). The extent to which Plaintiff is able to adduce facts that support the allegations set out in its complaint is, of course, an entirely different issue that can be examined at later stages of this proceeding. Similarly any issues that arise in attempting to “undo” the transfer of the Grovestone Property from Defendant Catawba to Defendant Ridgeline or in attempting to fashion a remedy that does not run afoul of the doctrine of “estoppel by benefit” are “fair game” for consideration on another day as well. As a result, we reverse that portion of the trial court’s Judgment of Dismissal that dismisses Plaintiff’s complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and remand this case to the trial court for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED

Judges ELMORE and STROUD concur.

9. Although Defendants point out that Plaintiff has not alleged that Defendant Mark Lewis “was insolvent at that time or . . . become insolvent as a result of the transfer or obligation,” we are not persuaded that Plaintiff’s failure to allege that Defendant Mark Lewis was insolvent renders its complaint insufficient given the fact that the challenged transaction was between Defendant Catawba and Defendant Ridgeline.

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STATE OF NORTH CAROLINA v. ROBERT PETER VOGT, JR.

No. COA08-1441

(Filed 3 November 2009)

Criminal Law; Indecent Liberties— satellite-based monitoring—conviction predated effective date of satellite-based monitoring statutes

The trial court did not err in an indecent liberties case by ordering that defendant be enrolled in a lifetime satellite-based monitoring (SBM) program even though the date upon which he committed the offense for which he was convicted predated the effective date of the SBM statutes. Retroactive application of the SBM provisions does not violate the *ex post facto* clauses of the state and federal constitutions and the record was devoid of any indication that the State ever agreed to forego seeking to have defendant enrolled in the SBM program.

Judge ELMORE dissenting.

Appeal by defendant from order entered 3 July 2008 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Peter A. Regulski, for the State.

William D. Auman, for defendant.

ERVIN, Judge.

On 28 August 2006, the Mecklenburg County Grand Jury returned a true bill of indictment charging Defendant with taking indecent liberties with a minor. On 9 June 2008, Defendant entered a plea of guilty to that offense. After accepting Defendant's guilty plea, the trial court found that Defendant had a prior record level of II. As a result, the trial court sentenced Defendant to a minimum term of 15 months and a maximum term of 18 months imprisonment in the custody of the North Carolina Department of Correction. The trial court suspended Defendant's active sentence and placed Defendant on supervised probation for a term of 60 months subject to a number of terms and conditions, including, but not limited to, requiring that Defendant serve an active term of 120 days in the custody of the Sheriff of Mecklenburg County and that Defendant be supervised by officers

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assigned to the Intensive Probation Program for a period of six months. The trial court also notified Defendant of his obligation to register “with the sheriff of the county where you reside for a period of at least 10 years, because you have been convicted of a ‘reportable conviction’ as defined by [N.C. Gen. Stat. §] 14-208.6(4).”

An additional hearing was held on 3 July 2008 for the purpose of determining whether Defendant would be subject to lifetime satellite-based monitoring. At the conclusion of the 3 July 2008 hearing, the trial court determined that Defendant had been convicted of third degree sexual exploitation of a minor in Avery County on 15 April 2005, that he was properly classified as a “recidivist” as that term is defined in N.C. Gen. Stat. § 14-208.6(2b), and that Defendant “shall be enrolled in a satellitebased monitoring program as a special condition of the defendant’s probation and, following the period of supervised probation, the defendant shall be enrolled in a satellite-based monitoring program for his/her natural life unless the monitoring program is terminated pursuant to [N.C. Gen. Stat. §] 14-208.43.” Defendant noted an appeal to this Court from the 3 July 2008 order.

On appeal, Defendant contends that the trial court erred by subjecting him to lifetime satellite monitoring on the grounds that the date upon which he committed the offense leading to his 9 June 2008 conviction antedated the effective date of the satellite-based monitoring statutes¹ and that he received constitutionally deficient representation from his trial counsel because she failed to argue that subjecting Defendant to lifetime satellite-based monitoring violated his federal and state constitutional rights against the enactment of *ex post facto* laws. The section of Defendant’s brief addressing the first issue does not, however, contain a traditional statutory construction argument focused on the structure, purpose, and language of the relevant statutory provisions. Instead, Defendant argues that these statutory provisions should not be applied to persons convicted of offenses committed prior to their effective date because doing so would violate the federal and state constitutional prohibition against the enactment of *ex post facto* laws and because applying the relevant statutory provisions in that manner would invalidate Defendant’s guilty plea given that he could not have been advised that

1. According to the record, the offense which subjected Defendant to lifetime satellite-based monitoring was committed on 21 June 2006. The satellite-based monitoring statute became effective for defendants sentenced to intermediate punishment after 16 August 2006. Judgment was initially entered against Defendant on 9 June 2008. The trial court’s order subjecting Defendant to lifetime satellite-based monitoring was entered on 3 July 2008.

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he would be subjected to lifetime satellite-based monitoring as required by N.C. Gen. Stat. § 15A-1022 since such monitoring did not exist at the time that he entered his guilty plea.² Furthermore, given that courts are permitted to deal with ineffective assistance of counsel claims by “determin[ing] at the outset that there is no reasonable probability that in the absence of counsel’s alleged errors the result of the proceeding would have been different,” *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985), Defendant’s ineffective assistance of counsel claim can be resolved in the event that subjecting Defendant to lifetime satellite-based monitoring does not violate the constitutional prohibition against the enactment of *ex post facto* laws.³ As a result, Defendant’s challenges to the 3 July 2008 order ultimately rest on contentions that subjecting him to lifetime satellite-based monitoring violates the constitutional prohibition against the enactment of *ex post facto* laws and results in a violation of N.C. Gen. Stat. § 15A-1022.

On 16 June 2009, a panel of this Court filed its decision in *State v. Bare*, — N.C. App. —, 677 S.E.2d 518 (2009). In *Bare*, we concluded that “the legislature intended [satellite-based monitoring] to be a civil and regulatory scheme,” *Id.*, — N.C. App. at —, 677 S.E.2d at 524; that “the restrictions imposed by the [satellite-based monitoring] provisions do not negate the legislature’s expressed civil intent,” *Id.*, — N.C. App. at —, 677 S.E.2d at 531; and that “retroactive appli-

2. This aspect of Defendant’s argument is not entirely clear to us. In his brief, Defendant states that, “[a]s the satellite monitoring law was not in effect until after entry of [Defendant’s] plea, there is no question that he was not advised of the prospect of additional punishment being imposed at some later date.” The record indicates that Defendant entered a plea of guilty to taking indecent liberties with a minor in Mecklenburg County File No. 06 CrS 236346 on 9 June 2008, almost two years after the lifetime satellite-based monitoring statutes became effective on 16 August 2006. From this language, one might well assume, as the State appears to do, that Defendant is making reference to his 15 April 2005 conviction in this portion of his brief. On the other hand, the dissent focuses on Defendant’s plea agreement in this case. However, Defendant has not asked us to set aside his guilty plea or any requirement imposed upon him in Mecklenburg County File No. 06 CrS 235346 aside from the obligation that he be subject to lifetime satellite-based monitoring. On the contrary, he specifically states in his brief that “[D]efendant does not challenge any issue relating to the acceptance of his plea or judgment entered on” 9 June 2008. In addition, Defendant has not sought to have his 15 April 2005 conviction set aside either. Thus, we are at something of a loss to understand the exact nature of Defendant’s argument in reliance on N.C. Gen. Stat. § 15A-1022, although we still address it in the text to a limited extent.

3. Not surprisingly, since the dissent reaches a different result than we do with respect to the principal substantive issue raised by Defendant’s appeal, our dissenting colleague would not dispose of Defendant’s ineffective assistance of counsel claim in the manner that we deem appropriate.

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cation of the [satellite-based monitoring] provisions do[es] not violate the *ex post facto* clause.” *Id.* In addition, we also concluded that “lifetime satellite-based monitoring was [not] an automatic result of defendant’s no contest plea,” “unlike a mandatory minimum sentence or an additional term of imprisonment,” so that the fact that the defendant in *Bare* was not advised that he might be subjected to lifetime satellite-based monitoring at the time of his no contest plea did not serve to invalidate his conviction. *Id.*, — N.C. App. at —, 677 S.E.2d at 531-32. Since this Court has already decided both of the claims Defendant asserts in this case adversely to his position in *Bare* and since we are bound by our decision in *Bare* with respect to these issues, *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (stating that, “[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court”); *Harrison v. Harrison*, 180 N.C. App. 452, 455, 637 S.E.2d 284, 287 (2006) (stating that “it is axiomatic that one panel of the Court of Appeals may not overrule another panel”), we conclude that the trial court’s decision should be affirmed on the basis of our decision in *Bare*.

Although this Court’s decision in *Bare* addresses and rejects both of Defendant’s challenges to the trial court’s order, the dissent concludes that, because of differences between the record in this case and the record before the Court in *Bare*, we are entitled to look at certain issues relating to the lawfulness of satellite-based monitoring afresh and reach a different result.⁴ The extent to which the dissent’s argument has persuasive force hinges upon the extent to which it has identified legally material differences between the record before the Court in *Bare* and the record before the Court in this case. After carefully reviewing the opinion in *Bare* and the present record, we are not persuaded that we should revisit either of the relevant holdings in *Bare* on the grounds advocated by the dissent.

Although the dissent concedes “that most of [D]efendant’s arguments were addressed by this Court several months ago in” *Bare*, our dissenting colleague believes “that we have the benefit of additional

4. As the dissent notes, the panel in *Bare* clearly indicated that its decisions were based on the record that was before it in that case. For example, the Court stated that, “[b]ased on the record before us, retroactive application of the [satellite-based monitoring] provisions do not violate the *ex post facto* clause.” Thus, we do not dispute the dissent’s proposition that a material difference in the record between this case and *Bare* could conceivably support a different outcome. Instead, for the reasons set out below, we simply do not believe that such a material difference exists in this case.

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Department of Correction (DOC) rules and regulations” which serve to make [D]efendant’s case distinguishable from” *Bare*. As we read the dissenting opinion, it distinguishes *Bare* from this case based upon its determination that we should judicially notice the North Carolina Department of Correction Policies-Procedures, No. VII.F Sex Offender Management Interim Policy (interim guidelines). In essence, the dissent utilizes various provisions of the interim guidelines to argue that the satellite-based monitoring statutes have a punitive effect under the test set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 9 L. Ed. 2d 644 (1963), so as to render the satellite-based monitoring program a “punishment” for purposes of the prohibition against the enactment of *ex post facto* laws. For example, in concluding that the satellite-based monitoring program “involves an affirmative disability or restraint,” *Mendoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 661, the dissent notes the provisions of the interim guidelines to the effect that “[t]he offender *shall* cooperate with the [DOC] and the requirements of the satellite-based monitoring program;” that “[a]n offender cannot leave the [S]tate of North Carolina;” that “[a]n offender is subject to unannounced warrantless searches of his residence every ninety days;” that “[a]n offender must maintain a daily schedule and curfew as established by his DOC case manager;” that “[a]n offender’s schedule and curfew includes spending at least six hours each day at his residence in order to charge his portable tracking device;” and that, “[i]f an offender has an active religious affiliation,” “the offender’s case manager must ‘notify church officials of the offender’s criminal history and supervision conditions[.]’” According to the dissent, given the provisions of the interim guidelines, “the [satellite-based monitoring] program imposes affirmative and intrusive post-discharge conduct [restrictions] upon offenders long after they have completed their sentences, their parole, their probation, and their regular post-release supervision; these restraints continue forever.” As a result, the dissent concludes that, because the interim guidelines were not discussed in *Bare* and because these documents demonstrate that the satellite-based monitoring program has a punitive effect, we can appropriately revisit the issue of whether satellite-based monitoring constitutes a punishment rather than a civil and regulatory regime for purposes of the *ex post facto* provisions of the federal and state constitutions and conclude that the imposition of such monitoring upon Defendant violates the *ex post facto* law clauses despite the fact that a contrary result was reached in *Bare*.

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Although we do not dispute the Court's authority to judicially notice the interim guidelines, *State ex rel. Utilities Commission v. Southern Bell Telephone and Telegraph Co.*, 289 N.C. 286, 288, 221 S.E.2d 322, 323 (1976), we are not persuaded that we should exercise our discretion to do so given that the parties did not bring these guidelines to our attention or discuss them in their briefs. N.C. Gen. Stat. § 8C-1, Rules 201(c) and (f). A decision to judicially notice the interim guidelines in this case does not simply have the effect of filling a gap in the record or supplying a missing, essentially undisputed fact; instead, judicially noticing the interim guidelines in this case introduces a large volume of additional information which has not been subjected to adversarial testing in the trial courts. In the absence of a full and thorough discussion of the contents and implications of these documents by the parties and in view of their interim nature, we are concerned about basing a decision of the nature suggested by the dissent upon them, since acting in that fashion might well put this Court in the position of a trier of fact, a role that we are not supposed to occupy. *Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.* 168 N.C. App. 223, 226, 606 S.E.2d 708, 711 (2005) (stating that an appellate court should not initially decide questions of fact).

Furthermore, assuming that these documents are to be judicially noticed, we are not persuaded that they constitute a material difference between the record in this case and that before the Court in *Bare*. At bottom, the issue raised by Defendant's *ex post facto* challenge to the trial court's order subjecting him to lifetime satellite-based monitoring is whether that program as enacted by the General Assembly had a punitive effect.⁵ In view of the fact that the Department of Correction's interim guidelines may or may not be sustained as consistent with the rulemaking and contracting authority granted by the General Assembly⁶ in the event that they are subject

5. The dissent points out that, "[w]hen the legislature chooses not to amend a statutory provision that has been interpreted in a specific way, [the appellate courts] assume that it is satisfied with the administrative interpretation." *Wells v. Consol. Jud'l Ret. Sys. (of N.C.)*, 354 N.C. 313, 319-20, 553, S.E.2d 877, 881 (2001). A careful analysis of the decision upon which the dissent relies, however, indicates that the strength of this "legislative acquiescence" argument varies with the antiquity of the administrative interpretation. In this instance, the relative novelty of the satellite-based monitoring regime militates against giving much, if any, weight to any interpretation of the General Assembly's intent embodied in the interim guidelines.

6. According to N.C. Gen. Stat. § 14-208.40(a), the General Assembly required the "Department of Correction [to] establish a sex offender monitoring program that uses a continuous satellite-based monitoring system" and to "create guidelines to govern the program." Furthermore, N.C. Gen. Stat. § 14-208.40(d) provides that the Department of

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to challenge in an appropriate forum, the fact that the guidelines are expressly described as interim in nature, and the fact that the courts retain the authority to strike down various provisions of the interim guidelines and related documents as violative of either the relevant statutory provisions or various provisions of the federal or state constitutions⁷, it appears to us that we should focus our attention on the statutory provisions adopted by the General Assembly rather than on an executive branch agency's efforts to implement the General Assembly's decision in resolving the *ex post facto* law issue. To put it another way, it appears to us that the manner in which the Department of Correction chooses to implement the lifetime satellite-based monitoring program on an interim basis is a separate and distinct issue from the question of whether subjecting an individual to satellite-based monitoring based on a conviction for an offense that occurred prior to the effective date of the statutory provisions establishing that program violates the prohibition against the enactment of *ex post facto* laws. For all of these reasons, we do not believe that a decision to judicially notice the interim guidelines provides an adequate basis for disregarding the decision in *Bare*. As a result, despite the arguments advanced in the dissent, we believe that we remain bound by the *Bare* decision and that it precludes granting the relief requested by Defendant on appeal.⁸

In addition to concluding that “[D]efendant’s enrollment in the [satellite-based monitoring] program constitute[d] an unconstitutional *ex post facto* punishment,” the dissent also concludes that “the trial court erred by imposing a condition upon [D]efendant that was

Correction may enter into a contract or contracts with one or more vendors “for the hardware services needed to monitor subject offenders and correlate their movements to reported crime incidents.” It should go without saying that the guidelines adopted and contracts entered into by the Department pursuant to N.C. Gen. Stat. § 14-208.40 must be consistent with the various statutory provisions governing the lifetime satellite-based monitoring program. *Com’r of Ins. v. Ins. Co.*, 28 N.C. App. 7, 11, 220 S.E.2d 409, 412 (1975) (stating that “[a]n administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law”) (citation omitted).

7. To be absolutely clear, we believe that an individual subject to satellite-based monitoring has the right, in an appropriate proceeding, to challenge the validity of specific provisions of the interim guidelines or contracts on the grounds that they violate state or federal law, including relevant provisions of the federal and state constitutions, and obtain a ruling on that claim in the appropriate division of the General Court of Justice.

8. As should be obvious, we express no opinion about the likely outcome of an analysis using the *Mendoza-Martinez* factors conducted on the basis of a record that contains properly-developed information relating to the interim guidelines.

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not specifically agreed to in his plea bargain.” In essence, the dissent concludes that, since “[D]efendant received a punishment in excess of what he was promised in exchange for his guilty plea,” he is entitled to be relieved from the requirement to participate in the satellite-based monitoring program. We find this argument unpersuasive for three different reasons.

First, the “negotiated plea” argument adopted in the dissent is foreclosed by our decision in *Bare*. As we have already noted, *Bare* held that satellite-based monitoring is a civil and regulatory rather than a punitive regime. Subjecting Defendant to the impact of a civil and regulatory regime is not tantamount to the imposition of an additional punishment. Thus, given that we are bound by the result reached in *Bare*, we cannot conclude that Defendant has been subjected to a punishment over and above that contemplated under his plea agreement.

Secondly, Defendant did not make the “negotiated plea” argument adopted in the dissent in his brief. Although the appellate courts in this jurisdiction have gone to considerable lengths to reach the merits where litigants have arguably presented substantive issues for review, *Carolina Forest Asso. v. White*, — N.C. App. —, —, 678 S.E.2d 725, 729-30 (2009) (stating that the Court, “[a]fter careful study of the record and Defendant’s brief,” could “discern four possible issues in this appeal” and would address them rather than dismissing Plaintiffs’ appeal), the Supreme Court has instructed us not to “create an appeal for an appellant.” *Viar v. North Carolina Dept. of Transportation*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). See also *State v. Garcell*, 363 N.C. 10, 70, 678 S.E.2d 618, 655 (2009) (stating, in reliance on N.C.R. App. P. 28(b)(6) that defendant’s failure to provide any argument or supporting authority for certain assignments of error resulting in their abandonment). Although Defendant did, as we have already discussed, argue in his brief that construing the relevant statutory provisions as applicable to a person in his position would violate his rights under N.C. Gen. Stat. § 15A-1022(a), he never contended that the State breached his plea agreement by virtue of the fact that the trial court entered an order subjecting him to lifetime satellite-based monitoring. As a result, we believe that Defendant’s failure to advance the “negotiated plea” argument adopted by the dissent on appeal precludes us from relying on it to exempt Defendant from participating in the satellite-based monitoring program.

Finally, the “negotiated plea” argument advanced by the dissent rests upon at least two fundamental premises that lack adequate

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record support. First, we are not aware of any evidence in the record to the effect that, at the time that he entered his negotiated guilty plea, Defendant was unaware that the State took the position that he was subject to a satellite-based monitoring obligation. Secondly, in order for the dissent's "contract-based" theory to be sustainable, it appears to us that the State would have had to have agreed that Defendant would not be subject to satellite-based monitoring as part of the parties' plea agreement. Once again, the record is totally devoid of any indication that the State ever agreed to forego seeking to have Defendant enrolled in the satellite-based monitoring program. In the absence of evidentiary support for these two factual propositions, the "negotiated plea" argument advanced in the dissent is unpersuasive.

Thus, given our conclusion that this case is not materially distinguishable from *Bare* and that the issues that Defendant has brought forward for our consideration on appeal were resolved in the State's favor in *Bare*, we believe that we are obligated to affirm the trial court's order subjecting Defendant to lifetime satellite-based monitoring. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judge Stroud concurs.

Judge Elmore dissents in a separate opinion.

ELMORE, Judge, dissenting.

I respectfully dissent from the majority opinion affirming the trial court's order requiring defendant to enroll in satellite-based monitoring. Although I recognize that most of defendant's arguments were addressed by this Court several months ago in *State v. Bare*, I believe that we have the benefit of additional Department of Corrections (DOC) rules and regulations in this case, which makes defendant's case distinguishable from Mr. Bare's. In *Bare*, we explained repeatedly that our conclusions were based upon the record before us and that the record could not support a contrary finding. *See., e.g., State v. Bare*, — N.C. App. —, —, 677 S.E.2d 518, 528 (2009). I believe that the record before us now can and should support a contrary finding.

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Here, we may augment the record on appeal by taking judicial notice of the DOC's "Sex Offender Management Interim Policy" (Interim Policy). "The device of judicial notice is available to an appellate court as well as a trial court[.] This Court has recognized in the past that important public documents will be judicially noticed." *Utilities Comm. v. Southern Bell Telephone Company*, 289 N.C. 286, 288, 221 S.E.2d 322, 323 (1976) (quotations and citations omitted); *see also State v. R.R.*, 141 N.C. 846, 855, 54 S.E. 294, 297 (1906) ("Rules and regulations of one of the departments established in accordance with a statute have the force of law, and the courts take judicial notice of them[.]") (quotations and citations omitted). N.C. Gen. Stat. § 14-208.40 states that the DOC "shall create guidelines to govern the program," which "shall be designed to monitor two categories of offenders" and requires "that any offender who is enrolled in the satellite-based program submit to an active continuous satellite-based monitoring program, unless an active program will not work" N.C. Gen. Stat. § 14-208.40(a)-(b) (2007). There are no published regulations detailing the SBM guidelines because the DOC is exempt from the uniform system of administrative rulemaking set out in Article 2A of the Administrative Procedures Act "with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees." N.C. Gen. Stat. § 150B-1(d)(6) (2007).⁹ Instead, the DOC "shall adopt rules and regulations related to the conduct, supervision, rights and privileges of persons. . . . Such rules and regulations shall be filed with and published by the office of the Attorney General and shall be made available by the Department for public inspection." N.C. Gen. Stat. § 143B-261.1 (2007). The 2007 interim policy is such a rule or regulation and it is the sort of public document of which this Court may take judicial notice. *See Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 337, 341-42, 88 S.E.2d 333, 337, 340 (1955) (taking judicial notice of the North Carolina Building Code even though "the briefs of the parties make no reference to" it because its creation and adoption was required by statute and thus had the "force and effect of law"); *W. R. Company v. Property Tax Comm.*, 48 N.C. App. 245, 261, 269 S.E.2d 636, 645 (1980) (stating that we may take judicial notice of a corporate charter on file with the Secretary of State but not included by either party in the record on appeal); *Byrd v. Wilkins*, 69 N.C. App. 516, 518-19, 317 S.E.2d 108, 109 (1984) (taking

9. From the existence of the Interim Policy, I assume, without articulating a legal opinion on the matter, that the DOC treats offenders subject to satellite-based monitoring as persons "under its supervision."

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judicial notice of a Commission for Health Services “regulation on the procedure to be followed in administering breathalyzer tests”); *see also Wells v. Consolidated Jud’l Ret. Sys. of N.C.*, 354 N.C. 313, 319-20, 553 S.E.2d 877, 881 (2001) (“When the legislature chooses not to amend a statutory provision that has been interpreted in a specific way, we assume it is satisfied with the administrative interpretation.”). Our opinions in *Bare* and its progeny make no mention of the DOC’s Interim Policy and, thus, in my opinion, the application of the Interim Policy is unique to defendant’s appeal.

A. Ex Post Facto Punishment

For the following reasons, I respectfully disagree with the majority’s conclusion that SBM has no punitive purpose or effect and thus does not violate the *ex post facto* clause. To determine whether a statute is penal or regulatory in character, a court examines the following seven factors, known as the *Mendoza-Martinez* factors:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned[.]

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 661 (1963) (footnotes and citations omitted). Although these factors “may often point in different directions[, a]bsent conclusive evidence of [legislative] intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.” *Id.* at 169, 9 L. Ed. 2d at 661. Because I believe that *Bare* is determinative as to the question of whether there is conclusive evidence that the legislature intended the SBM statute to be penal, I begin my analysis by examining the seven *Mendoza-Martinez* factors.

1. Affirmative disability or restraint. The first question is “[w]hether the sanction involves an affirmative disability or restraint.” *Mendoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 661 (footnote and citations omitted). To echo the Supreme Court of Indiana, “[t]he short answer is that the Act imposes significant affirmative obligations and a severe stigma on every person to whom it applies.” *Wallace v. Indiana*, 905 N.E.2d 371, 379 (Ind. 2009).

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Both the SBM statutory provisions and its implementing guidelines require affirmative and intrusive post-discharge conduct under threat of prosecution.

In addition to the regular sex offender registration program requirements, which, though judicially determined to be non-punitive, are nevertheless significant in practice, SBM participants are subject to the following additional affirmative disabilities or restraints: (1) The DOC has “the authority to have contact with the offender at the offender’s residence or to require the offender to appear at a specific location as needed[.]” N.C. Gen. Stat. § 14-208.42 (2007). (2) “The offender *shall* cooperate with the [DOC] and the requirements of the satellite-based monitoring program[.]” *Id.* (emphasis added). (3) An offender cannot leave the state of North Carolina. *Sex Offender Management Interim Policy* 16 (effective 1 January 2007). (4) An offender must be at his residence for a minimum of four hours per day to charge the SBM device. *Id.* at 15.

Clearly, the SBM program imposes affirmative and intrusive post-discharge conduct upon an offender long after he has completed his sentence, his parole, his probation, and his regular post-release supervision; these restraints continue forever. Of particular note is the prohibition against leaving the state. As the U.S. Supreme Court has repeated,

The word “travel” is not found in the text of the Constitution. Yet the constitutional right to travel from one State to another is firmly embedded in our jurisprudence. Indeed, as Justice Stewart reminded us in *Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), the right is so important that it is “assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.” *Id.*, at 643 (concurring opinion).

Saenz v. Roe, 526 U.S. 489, 498, 143 L. Ed. 2d 689, 701 (1999) (additional quotations and citations omitted). The government may only interfere with a citizen’s right to interstate travel if it can show that such interference “is necessary to promote a compelling governmental interest[.]” *Id.* at 499, 143 L. Ed. 2d at 702 (quotations and citation omitted). Depriving an offender of his right to interstate travel is, without question, an affirmative disability or restraint.

Though some may argue that the remaining restrictions are mere inconveniences, this would be a deceiving understatement. Although offenders are no longer subject to formal probation, the requirements

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that they are subject to are nearly if not equally as intrusive: they cannot spend nights away from their homes, they are subject to schedules and curfews, they must appear on command, and they must submit to all DOC requests. An offender's freedom is as restricted by the SBM monitoring requirements as by the regular conditions of probation, which include: remaining in the jurisdiction unless the court or a probation officer grants written permission to leave, reporting to a probation officer as directed, permitting the probation officer to visit at reasonable times, answering all reasonable inquiries by the probation officer, and notifying the probation officer of any change in address or employment.

Accordingly, I believe that SBM imposes an affirmative disability or restraint upon defendant, which weighs in favor of the SBM statute being punitive rather than regulatory.

2. Sanctions that have historically been considered punishment. The next question is whether SBM "has historically been regarded as a punishment." *Mendoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 661 (footnote and citations omitted). Obviously, satellite monitoring technology is new and thus tracking offenders using the technology is not a historical or traditional punishment. However, the additional restrictions imposed upon offenders are considered punishments, both historically and currently. In addition, some courts have suggested that the SBM units, made up of an ankle bracelet and a miniature tracking device (MTD), are analogous to the historical punishments of shaming. *See, e.g., Doe v. Bredeson*, 507 F.3d 998, 1010 (2007) (Keith, J., concurring in part and dissenting in part), *cert. denied*, 172 L. Ed. 2d 210 (2008).

In *Bredeson*, the Sixth Circuit considered whether Tennessee's SBM statute violated the *ex post facto* clause. The *Bredeson* majority first held that the Tennessee legislature's purpose when enacting the SBM statute was to establish a civil, nonpunitive regime. *Id.* at 1004. The majority then examined the *Mendoza-Martinez* factors and concluded, in relevant part, that Tennessee's SBM program was not a sanction historically regarded as punishment. *Id.* at 1005. It explained that the Tennessee "Registration and Monitoring Acts do not increase the length of incarceration for covered sex offenders, nor do they prevent them from changing jobs or residences or traveling to the extent otherwise permitted by their conditions of parole or probation." *Id.* Judge Keith, in his dissent, characterized the GPS monitoring system as a "catalyst for ridicule" because the defendant's monitoring device was "visible to the public when worn" and had to "be worn every-

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where” the defendant went. *Id.* at 1010 (Keith, J., dissenting in part and concurring in part). “Public shaming, humiliation, and banishment are well-recognized historical forms of punishments.” *Id.* (citations omitted). It is clear from the DOC guidelines and maintenance agreements that the MTD must be worn on the outside of all clothing and cannot be concealed or camouflaged in any way, even though some forms of concealment or camouflage would not interfere with the LTD’s function. In addition, an offender’s religious institution must be informed of his status and his SBM compliance requirements. I agree with Judge Keith that the SBM scheme is reminiscent of historical shaming punishments, which weighs in favor of finding the scheme punitive, rather than regulatory.

3. Finding of scienter. The next question is whether the statute “comes into play only on a finding of *scienter*.” *Mendoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 661 (footnote and citations omitted). I believe that this factor is met because the underlying criminal acts, indecent liberties with a child and third degree sexual exploitation of a minor, require intentional conduct. *State v. Beckham*, 148 N.C. App. 282, 286, 558 S.E.2d 255, 258 (2002) (citation omitted); see N.C. Gen. Stat. § 14-202.1(a) (2007) (“A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either: (1) *Willfully* takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or (2) *Willfully* commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.”) (emphasis added); N.C. Gen. Stat. § 14-190.17A(a) (2007) (“A person commits the offense of third degree sexual exploitation of a minor if, *knowing* the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity.”) (emphasis added).

4. Traditional aims of punishment. The next question is “whether the sanction promotes the ‘traditional aims of punishment—retribution and deterrence.’” *Beckham*, 148 N.C. App. at 286, 558 S.E.2d at 258 (quoting *Mendoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 661). Without question, the sanction promotes deterrence. For example, offenders are restricted in their movements, ostensibly in part to prevent them from venturing into schoolyards or nurseries; when satellite-monitored offenders venture into these restricted zones, their supervisors are notified and the offender may

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be charged with a felony. Although “the mere presence of a [deterrent quality] is insufficient to render a sanction criminal [because] deterrence may serve civil, as well as criminal goals,” *Hudson v. United States*, 522 U.S. 93, 105, 139 L. Ed. 2d 450, 463 (1997) (quotations and citation omitted), the deterrent effect here is substantial and not merely incidental. Accordingly, it weighs in favor of finding the sanction to be punitive.

5. Applicability only to criminal behavior. The next question is “whether the behavior to which [the] statute applies is already a crime.” *Mendoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 567 (footnote and citation omitted). The SBM statute applies only to people who have been convicted of “reportable offenses.” Thus, this factor weighs in favor of finding the sanction to be punitive.

6. Advancing non-punitive interest. The next question is “whether an alternative purpose to which [the statute] may rationally be connected is assignable for it[.]” *Id.* at 168-69, 9 L. Ed. 2d at 567 (footnote and citation omitted). The SBM statute does advance a rationally related non-punitive interest, which is to keep law enforcement officers informed of certain offenders’ whereabouts in order to protect the public. Preventing further victimization by recidivists is a worthy non-punitive interest and one that weighs in favor of finding the sanction to be regulatory.

7. Excessiveness in relation to State’s articulated purpose. The final question is “whether [the statute] appears excessive in relation to the alternative purpose assigned” to it. *Id.* at 169, 9 L. Ed. 2d at 568 (footnote and citation omitted). “The excessiveness inquiry . . . is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective.” *Smith v. Doe*, 538 U.S. 84, 105, 155 L. Ed. 2d 164, 185 (2003). Judge Keith, dissenting from the majority opinion in *Bredeson*, explained SBM’s excessiveness as follows:

I fail to see how putting all persons in public places on alert as to the presence of offenders, like Doe, helps law enforcement officers geographically link offenders to new crimes or release them from ongoing investigations. It equally eludes me as to how the satellite-based monitoring program prevents offenders, like Doe, from committing a new crime. Although the device is obvious, it cannot physically prevent an offender from re-offending.

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Granted, it may help law enforcement officers track the offender (after the crime has already been committed), but it does not serve the intended purpose of public safety because neither the device, nor the monitoring, serve as actual preventative measures. Likewise, it is puzzling how the regulatory means of requiring the wearing of this plainly visible device fosters rehabilitation. To the contrary, and as the reflection above denotes, a public sighting of the modern day “scarlet letter”—the relatively large G.P.S. device—will undoubtedly cause panic, assaults, harassment, and humiliation. Of course, a state may improve the methods it uses to promote public safety and prevent sexual offenses, but requiring Doe to wear a visible device for the purpose of the satellite-based monitoring program is not a regulatory means that is reasonable with respect to its non-punitive purpose.

Sexual offenses unquestionably rank amongst the most despicable crimes, and the government should take measures to protect the public and stop sexual offenders from re-offending. However, to allow the placement of a large, plainly obvious G.P.S. monitoring device on Doe that monitors his every move, is dangerously close to having a law enforcement officer openly escorting him to every place he chooses to visit for all (the general public) to see, but without the ability to prevent him from re-offending. As this is clearly excessive, this factor weighs in favor of finding the Surveillance Act’s satellite-based monitoring program punitive.

Bredesen, 507 F.3d at 1012 (Keith, J., dissenting). I agree with Judge Keith’s assessment; the restrictions imposed upon defendant by the SBM statute are dangerously close to supervised probation if not personal accompaniment by a DOC officer. The *Bredesen* majority dismissed Justice Keith’s concerns about the device’s visibility by stating its “belie[f] that the dimensions of the system, while not presently conspicuous, will only become smaller and less cumbersome as technology progresses.” *Id.* at 1005. Smaller, less conspicuous, and less cumbersome technologies already exist, but implementation of new technologies is expensive and time-consuming. Though we may one day be able to tag and release a recidivist sex offender as though he were a migrating songbird, it is not a practical reality for defendant at this time or in the immediate future. The SBM equipment and accompanying restrictions as they exist now support a conclusion that SBM is a punishment.

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In sum, of the seven factors specifically identified by the U.S. Supreme Court in *Mendoza-Martinez* as relevant to the inquiry of whether a statute has a punitive effect despite legislative intent to the contrary, I believe that six factors point in favor of treating the SBM provisions as punitive. Only one—that the statute advances a non-punitive purpose—points in favor of treating the SBM provisions as non-punitive. Accordingly, I would hold that defendant’s enrollment in the SBM program constitutes a punishment.

Accordingly, I would also hold that defendant’s enrollment in the SBM program constitutes an unconstitutional *ex post facto* punishment.

B. Ineffective Assistance of Counsel and Double Jeopardy

I also respectfully disagree with the majority’s analysis of defendant’s ineffective assistance of counsel argument. Because I would hold that SBM is a criminal punishment, not a civil regulatory scheme, I would not dismiss this argument on those bases.

C. Violation of Plea Bargain

Finally, I respectfully disagree with the majority’s analysis of defendant’s argument that the trial court erred by imposing a condition upon defendant that was not specifically agreed to in his plea bargain. “Although a plea agreement occurs in the context of a criminal proceeding, it remains contractual in nature. A plea agreement will be valid if both sides voluntarily and knowingly fulfill every aspect of the bargain.” *State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993) (citations omitted). In *Rodriguez*, we explained that, because a defendant surrenders fundamental constitutional rights when he pleads guilty based upon the State’s promise, “when a prosecutor fails to fulfill promises made to the defendant in negotiating a plea bargain, the defendant’s constitutional rights have been violated and he is entitled to relief.” *Id.* at 145, 431 S.E.2d at 790 (quotations and citations omitted). Accordingly, I would hold that defendant received a punishment in excess of what he was promised in exchange for his guilty plea in violation of his constitutional rights.

For the foregoing reasons, I would reverse the order imposing lifetime satellite-based monitoring upon defendant.

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IN THE MATTER OF: F.G.J. AND M.G.J.

NO. COA09-522

(Filed 3 November 2009)

1. Termination of Parental Rights— no requirement to conduct bifurcated hearing—proper evidentiary standards

The trial court did not abuse its discretion in a termination of parental rights case by conducting an improperly bifurcated hearing because the court applied the different evidentiary standards at each of the two stages and there is no requirement that the stages be conducted at two separate hearings.

2. Evidence— hearsay—failure to show prejudice

Respondent failed to demonstrate prejudice from the trial court's admission of alleged hearsay testimony over respondent's objection.

3. Termination of Parental Rights— grounds—sufficiency of evidence

The trial court erred by concluding that grounds existed under N.C.G.S. § 7B-1111(a)(2) and (7) to terminate respondents' parental rights where the trial court made no specific findings regarding whether there was continued domestic violence and alcohol abuse and the facts did not establish that respondents were withholding their presence, love, or care, or that they have chosen to forego all parental duties and relinquish all parental claims.

Appeal by respondents from orders entered 9 January 2009 by Judge Albert A. Corbett, Jr. in Johnston County District Court. Heard in the Court of Appeals 14 September 2009.

Terry F. Rose for petitioner-appellee.

Susan J. Hall for respondent-appellant mother.

Richard E. Jester for respondent-appellant father.

James W. Carter for appellee guardian ad litem.

GEER, Judge.

Respondent mother and respondent father appeal from the trial court's orders terminating their parental rights to F.G.J. ("Fred") and

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M.G.J. (“Molly”).¹ The trial court concluded that grounds existed to terminate respondents’ parental rights under N.C. Gen. Stat. § 7B-1111(a)(2) and § 7B-1111(a)(7) (2007). We agree with respondents’ arguments that the trial court’s findings of fact are inconsistent with its conclusion under N.C. Gen. Stat. § 7B-1111(a)(7) that they abandoned their children. We, therefore, reverse the order below to the extent it rests on § 7B-1111(a)(7). As to N.C. Gen. Stat. § 7B-1111(a)(2) (willful failure to make reasonable progress in correcting the conditions that led to the removal of the children from parents’ custody), we hold that the trial court failed to make sufficient findings of fact on that ground to permit appellate review and, therefore, remand for further findings of fact.

Facts

The Johnston County Department of Social Services (“DSS”) became involved with the family in December 2004 when it received a report of an incident of domestic violence between respondents in which Fred was injured. The report indicated that respondents fought continually, that respondent father consumed alcohol excessively, and that there were times when there was no food in the house. Upon investigation, DSS found the home to be cluttered with dirty clothing, old food, and garbage. Respondent father was intoxicated at the time. Respondent mother was seven to eight months pregnant with Molly.

On 8 December 2004, respondents entered into a Safety Assessment with DSS that addressed concerns about domestic violence, substance abuse, and provision of food and diapers for the children. On 8 February 2005, respondents entered into a second Safety Assessment after it had been reported that the couple was still engaging in domestic violence, and respondent father was still regularly abusing alcohol to the point of intoxication.

On 25 February 2005, respondents entered into a Home Services Agreement with DSS in which respondent father agreed to participate in HALT, a domestic violence education program; to obtain a substance abuse assessment and follow any recommendations; to complete a 60-hour alcohol treatment course, as previously ordered in connection with a driving while impaired conviction; and to attend parenting classes. Respondent mother agreed to attend domestic violence classes for victims. In addition, both parents agreed to maintain

1. The pseudonyms “Fred” and “Molly” have been used throughout the opinion to protect the children’s privacy and for ease of reading.

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a safe and clean home for the juveniles and to demonstrate knowledge gained through their classes.

On 21 March 2005, DSS received another report of neglect. Upon investigation, DSS determined that respondent mother had been admitted to Johnson Memorial Hospital with a laceration to her arm so severe that an artery had been severed and surgical repair was necessary. Respondent mother claimed that she had become angry, “snapped,” and punched a medicine cabinet. Based on this injury and respondent mother’s statement, in addition to the history of domestic violence between the parents, DSS requested that the parents place the children with an appropriate caretaker.

The parents and the children moved in with respondent mother’s great aunt and her husband. A Safety Assessment was executed by respondents, the great aunt and her husband, and DSS in which respondents agreed that the children would not be in their presence unsupervised. While living with the great aunt and her husband, respondents engaged in at least three episodes of domestic violence in the great aunt’s and husband’s presence. Because of the continued domestic violence, respondents were asked to leave the home on 8 April 2005. The children, however, remained in the care of the great aunt and her husband. At that time, the Home Services Agreement was updated, and respondent mother agreed to obtain mental health treatment, although she had missed two already scheduled appointments.

On 4 May 2005, a DSS social worker noticed that respondent mother had lacerations on her forearms. Respondent mother refused to go to the hospital and told the social worker that she could cut herself if she wanted to when she got mad. DSS arranged for a psychological assessment of respondent mother that resulted in recommendations that respondent mother attend Dialectic Behavior Therapy as well as stress and anger management groups. DSS arranged and paid for parenting classes, but respondent mother attended only three sessions before she concluded that she did not need the classes and stopped attending. In April 2005, respondent mother began attending domestic violence classes.

On 5 June 2005, the Town of Selma Police Department was notified of a physical altercation between respondents and another man and woman. The Police Department reported that respondent mother was intoxicated on at least two occasions that day.

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On 28 June 2005, DSS filed neglect petitions for both Fred and Molly, alleging that respondents continued to engage in domestic violence, that respondent mother refused to fully participate in recommended services, and that respondent father had failed to demonstrate any learned behavior from his attendance at a domestic violence program.

The trial court adjudicated Fred and Molly to be neglected in an order filed 9 August 2005. Although DSS had custody of the children, the court authorized their placement with the great aunt and her husband. On 28 September 2005, however, the great aunt requested that the children be removed from her home. On 5 October 2005, following completion of a home study, the trial court, during a permanency planning hearing, ordered that the children be placed in the home of petitioner, respondent mother's brother.

On 26 November 2005, respondent mother contacted a DSS social worker and reported that respondent father had been intoxicated two weeks earlier and that he had been stopped and cited for driving with a revoked license. Respondent mother, who had been following respondent father in another car, received a citation for resisting an officer and using profanity. Respondent mother indicated to the social worker that she saw nothing wrong with the incident.

On 20 December 2005, respondent mother contacted a DSS social worker and reported that respondent father was continuing to drink alcohol and that he had refused to give her money to attend her mental health appointments. Respondent mother told the social worker she was willing to leave respondent father in order to have her children returned to her. As of January 2006, however, respondent mother was still living with respondent father.

On 26 January 2006, respondent mother told petitioner, her brother, that respondent father was still drinking and physically abusing her. Respondent mother asked petitioner to contact the Sheriff's Department on her behalf to report that respondent father had hit her in the back of the head with a juice bottle. After petitioner made the report, a DSS social worker went with respondent mother to obtain a domestic violence protective order. Respondent mother filed the necessary complaint, but subsequently refused to proceed with the charges. Upon determining that this was the fourth time respondent mother had taken out such a complaint and then failed to prosecute, the trial court ordered respondent mother to pay court costs, jail fees, and interpreter fees.

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On 8 February 2006, the trial court ordered DSS to cease reunification efforts with both parents. Respondent mother had reported that the January 2006 incident of domestic violence was accidental, and she was not sure whether respondent father was intoxicated at that time. The trial court concluded that respondent mother had failed to demonstrate any learned knowledge regarding domestic violence and continued to minimize respondent father's alcohol use.

By the time of the 1 March 2006 permanency planning hearing, respondent mother had completed all eight mandatory sessions of domestic violence education and had restarted parenting classes. Although respondent mother was also continuing her mental health classes, the class facilitator expressed some doubt as to respondent mother's level of comprehension. Respondent father had completed the HALT program, but had been asked to repeat the class due to the January incident of domestic violence. Respondent father had not taken steps to restart that program.

At the 1 March 2006 permanency planning hearing, the trial court approved a permanent plan for the children of guardianship with their maternal uncle, petitioner. Subsequently, at an October 2006 permanency planning hearing, the trial court approved a visitation plan for respondents, and since then respondents have visited with the children at least monthly. On 1 March 2007, petitioner filed petitions to terminate the parental rights of respondents to the children. Following the filing of those petitions, respondent father completed Family Pride classes on 26 March 2007, HALT domestic violence classes in April 2007, and parenting classes in June 2007. Respondent father had originally been asked to attend these classes in 2005. Respondents also continued to attend counseling with James Barbee, who first saw them in August 2006. The counselor reported at the termination of parental rights hearing that the couple was communicating better and that respondent father's substance abuse issues were "better." In addition, on 17 February 2008, respondent mother gave birth to a third child who resides with respondents.

Petitioner took a voluntary dismissal of the initial petitions for termination of parental rights on 3 April 2008 because of issues regarding service of the petitions on the juveniles. He then filed new petitions to terminate the parental rights of respondents on or about 4 April 2008.

In orders entered 9 January 2009—with a separate order for each child—the trial court concluded that grounds existed to terminate

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respondents' parental rights under N.C. Gen. Stat. § 7B-1111(a)(2) (willfully leaving a child in placement outside of the home for more than 12 months without making reasonable progress in correcting the conditions that led to the removal of the child) and N.C. Gen. Stat. § 7B-1111(a)(7) (willful abandonment). The court then concluded that it was in the best interests of each child that respondents' parental rights be terminated. Respondents timely appealed to this Court.

Discussion

A termination of parental rights proceeding is conducted in two phases: (1) an adjudication phase that is governed by N.C. Gen. Stat. § 7B-1109 (2007) and (2) a disposition phase that is governed by N.C. Gen. Stat. § 7B-1110 (2007). *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). During the adjudication stage, the petitioner has the burden of proving by clear, cogent, and convincing evidence that one or more of the statutory grounds for termination set forth in N.C. Gen. Stat. § 7B-1111 exist. The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

If the petitioner meets the burden of proving that grounds for termination exist, the trial court moves to the disposition phase and must determine whether termination of parental rights is in the best interests of the child. *See* N.C. Gen. Stat. § 7B-1110(a). "We review the trial court's decision to terminate parental rights for abuse of discretion." *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are 'manifestly unsupported by reason.'" *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)).

I

[1] Respondent father argues that the trial court erred in failing to conduct a properly bifurcated hearing. According to respondent father, the trial court improperly heard all of the evidence pertaining to the grounds for termination and the children's best interests at the same time. It is well established, however, that "so long as the court applies the different evidentiary standards at each of the two stages, there is no requirement that the stages be conducted at two

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separate hearings.” *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6, *disc. review denied sub nom. In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004).

This Court has also stressed that “since a proceeding to terminate parental rights is heard by the judge, sitting without a jury, it is presumed, in the absence of some affirmative indication to the contrary, that the judge, having knowledge of the law, is able to consider the evidence in light of the applicable legal standard and to determine whether grounds for termination exist before proceeding to consider evidence relevant only to the dispositional stage.” *In re White*, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 470 (1986). Respondent father has not demonstrated that the trial court failed to apply the appropriate evidentiary standards in either stage of the proceedings. Accordingly, this assignment of error is overruled.

II

[2] Respondent father next contends that the trial court erred in admitting “considerable hearsay testimony” over respondent father’s objection. In his brief on appeal, however, he challenges only two pieces of evidence, both involving a DSS social worker’s testimony regarding information contained in DSS’ records:

The record reflects the medical personnel did not feel [respondent mother’s] accounting of her injuries [when she lacerated her arm] were consistent with the actual injuries due to the extent of the damage repaired and that there were concerns that the injury may have been a result of domestic violence.

....

... On June 5th of '05, uh, [respondent father] engaged in physical altercation with a male friend, allegedly assaulted [respondent mother] and another female on that date, and the Selma Police were contacted and they reported observing [respondent father] intoxicated on at least two occasions that day.

Even assuming *arguendo* that this testimony constituted inadmissible hearsay, respondent father has failed to show that he was harmed by the admission of this testimony.² It is well established that

2. We do note, however, that the trial court’s findings of fact related to the material contained in the challenged testimony appear to be explaining why DSS took certain actions. Thus, the trial court found that DSS asked the parents to place the children with an appropriate caretaker based on the lacerated arm issue, and DSS filed the

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“even when the trial court commits error in allowing the admission of hearsay statements, one must show that such error was prejudicial in order to warrant reversal.” *In re M.G.T.-B*, 177 N.C. App. 771, 775, 629 S.E.2d 916, 919 (2006).

With respect to the first piece of testimony regarding the statements of medical personnel, the trial court made the following finding of fact: “Medical personnel reported [respondent mother’s] account of her injuries was not consistent with the actual injury and a family assessment was initiated.” This finding is not, however, solely supported by the challenged DSS social worker testimony. In addition, in the order adjudicating the children neglected, the trial court found regarding respondent mother’s lacerated arm: “Both the social worker in the hospital and the hospital personnel had concerns that the injury had been the result of something other than the story given by the mother. Both [respondent father] and [respondent mother] deny that the injury was the result of domestic violence and indicated that the mother had gone to the bathroom after a verbal argument and punched the mirror on the medicine cabinet resulting in her injury.”³

“Where there is competent evidence to support the court’s findings, the admission of incompetent evidence is not prejudicial.” *In re McMillon*, 143 N.C. App. 402, 411, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). Consequently, since the trial court’s finding is supported by the adjudication order, and respondent father has pointed to no other prejudice from the admission of the social worker’s testimony, we hold that respondent father has failed to demonstrate prejudice from the admission of the social worker’s testimony regarding the statements of hospital personnel.

With respect to the testimony regarding the 5 June 2005 altercation, the trial court found: “On or about June 5, 2005 the police department of the Town of Selma, North Carolina were [sic] notified of a physical altercation between [respondent father], another man, [respondent mother] and another female. The Selma Police Department reported [respondent mother] was intoxicated on at least two occasions on that day.” In the adjudication order, the trial court found

neglect petitions shortly after the June 2005 altercation because the parents continued to participate in domestic violence disputes. *See State v. Goblet*, 173 N.C. App. 112, 117, 618 S.E.2d 257, 261 (2005) (“A statement which explains a person’s subsequent conduct is an example of such admissible nonhearsay.”).

3. The trial court took judicial notice of the orders in the underlying juvenile files, and respondent father has not challenged the admission of those orders.

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“[o]n or about June 5, 2005, [respondent father] engaged in a physical altercation with a male friend”⁴ While this earlier finding does not fully support the finding in the termination of parental rights order, respondent father has not explained in what way he—as opposed to respondent mother—was prejudiced by the remaining portions of the finding that respondent mother and another female were somehow involved in the physical altercation and *respondent mother* had been intoxicated on at least two occasions on that day. Accordingly, respondent father has also not demonstrated prejudice as to this part of the DSS social worker’s testimony.

III

[3] Respondents next challenge the trial court’s determination that grounds existed under N.C. Gen. Stat. § 7B-1111 for termination of their parental rights. The trial court concluded that two grounds for termination existed. First, the trial court relied upon N.C. Gen. Stat. § 7B-1111(a)(2), which authorizes termination if “[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.” The court then also found that grounds for termination existed under N.C. Gen. Stat. § 7B-1111(a)(7), which authorizes termination if the court finds that “[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion.”

Respondent father initially argues that the trial court’s findings of fact regarding respondents’ history with DSS through the date of the order awarding guardianship to petitioner are matters “simply not relevant to the question present before the trial Court and now this Court.” In support of this assertion, respondent father notes that “[t]he determinative issue is the fitness of the parent to care for the child at the time of the termination proceeding[.]” citing *In re Ballard*, 311 N.C. 708, 319 S.E.2d 227 (1984), an opinion addressing neglect under N.C. Gen. Stat. § 7B-1111(a)(1). Respondent father then argues based on this principle that “[a]t the time of the termination proceeding there was no evidence of current alcohol abuse. There was no evidence of current domestic violence. There was no evidence

4. The trial court, in the neglect hearing, refused to admit the police report from the Selma Police Department because no police officer was present to testify. As a result, the trial court made no further findings regarding the incident.

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of current inadequate conditions at the home. There was no evidence to support the conclusions of neglect or abandonment found by the trial court. Even if the past history is true, it simply does not bear in any way on the present questions discussed below as the Conclusions of Law. The present and the future are controlling, and in this case very promising.”

The flaw in respondent father’s argument is that the trial court did not base its decision on neglect under N.C. Gen. Stat. § 7B-1111(a)(1). The question instead is whether “(1) respondents ‘willfully’ left the juvenile in foster care for more than twelve months, and (2) that each respondent had failed to make ‘reasonable progress’ in correcting the conditions that led to the juvenile’s removal from the home.” *In re Baker*, 158 N.C. App. 491, 494, 581 S.E.2d 144, 146 (2003). Respondents’ conduct during the time that the children were removed from their custody is relevant to determining whether they made reasonable progress and whether they acted willfully.

In this case, it is undisputed that at the time of the termination hearing, the juveniles had been out of the family home and placed either with relatives or in foster care for more than 31 months. It is also undisputed that in the year and a half immediately following the children’s removal from their custody, respondents failed to take any steps toward correcting the conditions that led to their removal. The unchallenged findings of fact are that in 2005 and for a little over half of 2006, respondents failed to address their documented issues with domestic violence, alcohol abuse by respondent father, anger management, and inadequate parenting.⁵

The trial court acknowledged that respondents began attending counseling sessions in August 2006, several months after the children were placed in guardianship with petitioner. Petitioner filed petitions to terminate respondents’ parental rights on 1 March 2007. As the trial court found, although respondent father had been asked in 2005 to participate in classes addressing the issues that led to the removal of the children, respondent father did not complete Family Pride classes

5. Respondent mother argues that this Court is limited to considering only that evidence in the 12-month period immediately preceding the filing of the termination of parental rights petition. N.C. Gen. Stat. § 7B-1111(a)(2) was, however, amended eight years ago to eliminate the need for reasonable progress in “the prior 12 months.” See *In re C.L.C., K.T.R., A.M.R., E.A.R.*, 171 N.C. App. 438, 447, 615 S.E.2d 704, 709 (2005) (“The focus is no longer solely on the progress made in the 12 months prior to the petition.”), *aff’d per curiam in part, disc. review improvidently allowed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006).

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until 26 March 2007, HALT domestic violence classes until April 2007, and parenting classes until June 2007.

The court then made the following pertinent findings of fact regarding respondents' progress:

34. The Court finds that the Johnston County Department of Social Services has been involved with the family consistently since the year 2005. The Court further finds that the evidence presented that since the year 2005 the mother has been unable to demonstrate the ability to maintain a home free from protective issues, even after completing numerous programs and groups to resolve said issues. The mother is not able to demonstrate any knowledge gained regarding domestic violence issues.

35. The Court finds as a fact that the parents have not successfully addressed any of the issues which led to the juvenile's removal. The court has considered evidence of changed conditions and determines that while the mother has previously completed the programs requested of her, she has not been able to demonstrate any knowledge gained as evidence of her resumption of the protective issues in the home and continues to deny any problems in the home as to domestic violence, alcohol consumption of [respondent father] or her parenting ability. The father has completed all of the programs or services requested of him to resolve the protective issues of the home, however, he continues to engage in excess alcohol consumption and incidents of domestic violence and physical altercations. The court further finds that neither parent has corrected the situations that led to the removal of the juveniles in the year 2005 at the time of the filing of this Petition to Terminate Parental Rights. The court further finds that most of the conditions that occurred at the time of the removal have not been successfully resolved as of this date.

. . . .

37. The court finds that the mother has willfully left the juvenile in a placement outside the home since September, 2005 without showing to the satisfaction of the court any reasonable progress under the circumstances to correct the conditions that led to the removal of the juvenile; the mother continues to reside with the father *and as late as the year 2006 incidents of domestic violence were still being reported between the father and mother*; the mother did not begin counseling or complete the pro-

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grams suggested by the Johnston County Department of Social Services until late in the year 2006 and the year 2007.

38. The court finds that the father has willfully left the juvenile in a placement outside the home since September, 2005 with[out] showing to the satisfaction of the court any reasonable progress under the circumstances to correct conditions that led to the removal of the juvenile; though the father completed HALT domestic violence program he was involved in another incident of domestic violence and was asked to repeat the program which he has failed to do; *the father as late as January 2006 was involved in an altercation while intoxicated.*

....

41. The Court finds that there has not been a showing to the satisfaction of this Court that the progress made by the parents has been reasonable under the circumstances. The Court further finds that all available services have been provided to the parents.

(Emphasis added.)

These findings of fact, focusing on what occurred through early 2007, do not explain why the trial court reached its ultimate determination that the efforts made by respondent parents in 2006 through April 2008—the date of the filing of the petition giving rise to the order on appeal—did not amount to reasonable progress. While petitioner focuses on evidence of domestic violence and alcohol consumption in 2008, the trial court made no findings of fact regarding that evidence, but rather discussed only incidents that occurred in early 2006. Without findings regarding the reasonableness, adequacy, or inadequacy of the 2006 through 2008 efforts, this Court cannot determine that the trial court's conclusions are supported by its findings of fact.⁶

We do not agree with respondents, however, that the order below should be reversed outright. Their assertion that there is no evidence of domestic violence or alcohol abuse by respondent father in late 2007 or 2008 is incorrect. Petitioner testified that in late 2007 or early 2008, while respondent mother was pregnant with respondents' third

6. Indeed, we note that the statement in finding of fact 38 that the father failed to repeat the HALT domestic violence program appears to be inconsistent with finding of fact 31, in which the court found that the HALT domestic violence classes were completed in April 2007.

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child, she told petitioner that respondent father was still drinking, still calling her names, and still hitting her. In addition, petitioner testified that two weeks before the termination of parental rights hearing, respondent mother told him that she had gotten mad and kicked respondent father, causing his head to hit the wall. Respondent father then jumped up and hit her on the head. Respondent mother also told petitioner that “[s]he’s got a knife, because she’s tired [of] that m.-f.er beating on her.” The 16-year-old daughter of petitioner’s domestic partner heard this part of the conversation and corroborated the statements about the fight and the knife. Respondent also told petitioner that she had had a relationship with another man, who was the father of her baby, and she was leaving respondent father because he continued to drink and beat her up.

Respondent father argues that this testimony constitutes inadmissible hearsay. It is, of course, admissible against respondent mother as an admission. *See* N.C.R. Evid. 801(d). In any event, no objection on hearsay grounds was made by either parent at trial. Therefore, any objection has been waived, and the testimony must be considered competent evidence. *See In re Ivey*, 156 N.C. App. 398, 403-04, 576 S.E.2d 386, 390 (2003) (holding that respondent parents waived claim that testimony constituted hearsay when they failed to object at trial on grounds of hearsay).

Petitioner contends that this evidence is sufficient to uphold the trial court’s order. The trial court, however, made no specific findings regarding whether domestic violence and alcohol abuse were continuing after early 2006. It is the role of the trial court and not this Court to make findings of fact regarding the evidence.⁷ *See In re T.P., M.P., & K.P.*, 197 N.C. App. 723, 730, 678 S.E.2d 781, 787 (2009) (“We have little doubt after studying the record that there existed evidence from which the trial court could have made findings and conclusions to support its orders for termination of parental rights. Unfortunately, the skeletal orders in the record are inadequate to allow for meaningful appellate review.”); *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009) (“Although there may be evidence in the record to support a finding that Respondent acted inconsistently with his custodial rights, it is not the duty of this Court to issue findings of fact.”).

7. Although the trial court did find generally that respondent father “continues to engage in excess alcohol consumption and incidents of domestic violence and physical altercations[,]” we cannot tell from reading the order, which references only incidents occurring in 2006, whether the court was referring to the statements that petitioner testified respondent mother made.

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We also acknowledge that the trial court could have found that the progress made by respondents was not reasonable under the circumstances. *See In re B.S.D.S.*, 163 N.C. App. 540, 545-46, 594 S.E.2d 89, 93 (2004) (upholding termination of parental rights when parent delayed one year in attending court-ordered classes, did not follow up on obligation to seek therapy until termination of parental rights petition was filed, and saw counselor only three weeks before hearing); *In re Oghenekevebe*, 123 N.C. App. 434, 437, 473 S.E.2d 393, 397 (1996) (affirming trial court's finding that respondent willfully left child in foster care and failed to show reasonable progress and pointing out that respondent mother had failed to make any progress in therapy "until her parental rights were in jeopardy"). Given the findings of fact, however, we would be speculating as to the trial court's rationale if we were to uphold the trial court's order on this basis.

Although the trial court's current findings of fact are insufficient to permit this Court to review its decision under N.C. Gen. Stat. § 7B-1111(a)(2), we must also consider its determination that grounds exist under N.C. Gen. Stat. § 7B-1111(a)(7). *See In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) (explaining that "where the trial court finds multiple grounds on which to base a termination of parental rights, and 'an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds' " (quoting *In re Clark*, 159 N.C. App. 75, 78 n.3, 582 S.E.2d 657, 659 n.3 (2003))), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

The trial court's findings of fact regarding abandonment include:

39. The mother has willfully abandoned the juvenile for the six month[s] preceding the filing of the petition; though the mother does visit the child on occasions, her visits are timed at her convenience and though the mother does occasionally bring the child some toys or clothes when she visits, the clothes many times are not the appropriate size; mother pays no child support on a regular basis.

40. The father has willfully abandoned the juvenile for the six month[s] preceding the filing of the petition; though the father does visit the child on occasions, his visits are timed at his convenience and though the father does occasionally bring the child some toys or clothes when he visits, the clothes many times are not the appropriate size; father pays no child support on a regular basis.

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The trial court's other findings of fact relate to whether or not respondents addressed the conditions that led to the removal of their children. The only other finding of fact relevant to the issue of abandonment is the trial court's finding that "[t]he mother and father visit with the juveniles at least monthly."

This Court has held that "[a]bandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. The word 'willful' encompasses more than an intention to do a thing; there must also be purpose and deliberation." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (internal citation omitted). "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *Id.* at 276, 346 S.E.2d at 514. Further, this Court has found willful abandonment to exist "where a parent withholds his presence, his love, his care, the opportunity to display filial affection, and [willfully] neglects to lend support and maintenance." *In re D.J.D., D.M.D., S.J.D., J.M.D.*, 171 N.C. App. 230, 241, 615 S.E.2d 26, 33 (2005) (internal quotation marks omitted).

In light of the trial court's findings of fact that the parents visit with the children at least once a month and that they bring the children toys or clothes when they do visit, we must hold that the trial court erred in concluding that grounds for termination exist under N.C. Gen. Stat. § 7B-1111(a)(7). Even if, as the trial court found, the visits are timed for respondents' convenience, the clothes are frequently not the appropriate size, and respondents do not pay child support on a regular basis, those facts do not establish that respondents are withholding their presence, love, or care or that they have chosen to forego all parental duties and relinquish all parental claims. Accordingly, we hold that the trial court's conclusion based on N.C. Gen. Stat. § 7B-1111(a)(7) is not supported by the findings of fact.

Conclusion

We, therefore, vacate the decision below and remand for further findings of fact regarding N.C. Gen. Stat. § 7B-1111(a)(2). We leave to the discretion of the trial court whether to hear additional evidence. We reverse that portion of the order concluding that grounds exist for termination under N.C. Gen. Stat. § 7B-1111(a)(7). Because of our disposition of this appeal, we do not reach respondents' remaining arguments.

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Reversed in part; vacated and remanded in part.

Judges HUNTER, JR. and BEASLEY concur.

STATE OF NORTH CAROLINA v. DARRYL WILLIAM COLEMAN

No. COA09-307

(Filed 3 November 2009)

1. Sexual Offenses— sex offense by custodian—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of sex offense by a custodian because: (1) the State presented substantial evidence on each element of N.C.G.S. § 14-27.7(a) and that defendant was the perpetrator of the offense; and (2) the State is not required to present evidence that a defendant knew or should have known the victim was in his custody or in the custody of his principal or employer.

2. Indecent Liberties— adult in custodial relationship with child—watching included as separate act

The trial court did not err by denying defendant's motion to dismiss three charges of indecent liberties with a minor. When an adult in a custodial relationship with a child watches that child engage in sexual activity with another person or facilitates such activity, the adult's actions constitute indecent liberties with a minor. Defendant's contention that counts for touching and watching arose from a single transaction was incorrect as there were clearly two separate acts.

3. Criminal Law— instructions—lapsus linguae

A *lapsus linguae* instructing the jury on returning a not guilty verdict on all charges was not plain error. The trial court did not commit plain error by instructing the jury on finding defendant guilty or not guilty of the charges against him because the jury would not have reached a different result but for the *lapsus linguae* when considering all the instructions in the context of the entire charge.

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4. Sexual Offenses— sex offense by custodian—instruction—knowledge that victim was in his custody—not required

The trial court did not commit plain error by its instruction to the jury regarding the charge of sex offense by a custodian because defendant's knowledge that the victim was in his custody was not a required element of the charge.

Appeal by defendant from judgments entered 22 May 2008 by Judge Jesse B. Caldwell, III, in Lincoln County Superior Court. Heard in the Court of Appeals 15 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State.

Parish, Cooke & Condlin, by James R. Parish, for defendant-appellant.

CALABRIA, Judge.

Darryl William Coleman ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of one count of statutory sex offense, one count of a sex act by a custodian, and four counts of indecent liberties with a minor. We find no error.

I. BACKGROUND

In June 2006, defendant was employed by Kingspoint Academy ("Kingspoint") at a boys' group home ("the boys' home") in Lincolnton, North Carolina. Kingspoint also operated a girls' group home ("the girls' home") in Shelby, North Carolina. Defendant, who was 40 years old at the time, worked at the boys' home on the weekends.

On 25 and 26 June 2006, "Allen"¹, who was 15 years old, and "Jordan," who was under 16 (collectively "the boys") lived in the boys' home along with five other boys. During the same time period, defendant worked the 8:00 p.m. to 8:00 a.m. shift and "Kelsey," "Dana," and "Taylor" (collectively "the girls") lived at the girls' home. Kelsey was 14 years old and Dana was 15 years old. On 25 June 2006, the girls left the girls' home without permission. The girls previously met Allen and some of the other boys from the boys' home at a Kingspoint summer camp. The girls called Jordan on the telephone,

1. The names of the minors involved in this case have been changed and their pseudonyms are initially noted in quotations.

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told him they were coming over to the boys' home, and defendant was informed of the girls' plans.

When the girls arrived at the boys' home, Allen and Jordan were outside playing basketball. Defendant was also present and told the girls to return when the rest of the staff was asleep. The girls went to a friend's house and got drunk. Later that evening, the girls, still intoxicated, returned to the boys' home. After the girls entered the boys' home through the downstairs windows, defendant told them they could spend the night but that they had to be quiet so they would not awaken the staff. Defendant, Kelsey, and Allen stayed in Allen's room on the first floor of the home.

During the evening, defendant told Dana that she had nice breasts and then touched her breasts. Defendant told Kelsey she had to show him her breasts if she wanted to spend the night. Defendant then touched her breasts. Next, he told Allen to leave the room and when Allen returned, Kelsey was naked. Kelsey performed fellatio on defendant. Subsequently, Allen had sexual intercourse with Kelsey in Allen's room. During the course of Allen and Kelsey's sexual activity with each other, defendant left and re-entered the room repeatedly and watched them having sex. Defendant told Allen, referencing Kelsey, "that's my baby[,] don't hurt her, . . . do her right . . ."

Early in the morning of 26 June 2006, the girls left the boys' home by climbing out the back window. Taylor called her mother, who picked up the girls. When the girls returned to the girls' home, they went to the office. Dana eventually revealed that they went to the boys' home and described the sexual activity that took place between defendant and Kelsey and between the boys and girls.

Officers of the Lincolnton Police Department ("officers") interviewed the boys and girls. Kelsey admitted she had sex with Allen while defendant watched, that defendant fondled her breasts and that defendant asked for fellatio, which she performed on him. Dana told the officers that defendant told the girls to leave the boys' home and return after the staff was asleep. She further stated defendant felt her breasts, that she saw Kelsey and Allen having sex, and saw Kelsey perform fellatio on defendant and on Jordan. Allen admitted he had sex with Kelsey while defendant watched, and that he also saw defendant grab Kelsey's breast.

On 30 June 2006, defendant voluntarily contacted the officers to give a statement. He was advised of his Miranda rights and signed a written waiver. Defendant admitted that on the evening in question,

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he saw both Jordan and Allen each having sex with one of the girls in the boys' group home. Defendant added that after Allen finished having sex with one girl, defendant touched her breast and she performed fellatio on him. Defendant then stated he touched another girl's breast.

Defendant was arrested and charged with statutory rape, statutory sex offense, engaging in a sex act by a custodian, and four counts of indecent liberties with a minor. He was subsequently indicted on all charges except statutory rape. Defendant filed a motion to suppress his statement to the police. The trial court denied the motion.

All charges were joined for trial, which commenced on 19 May 2008 in Lincoln County Superior Court. At the close of the State's evidence and at the close of all the evidence, defendant moved to dismiss each of the charges due to the insufficiency of the evidence. The trial court denied both motions.

On 22 May 2008, the jury returned verdicts of guilty to statutory sex offense, engaging in a sex act by a custodian, and four counts of indecent liberties with a minor. On the statutory rape charge, the trial court sentenced defendant to a minimum term of 230 months and a maximum term of 285 months in the custody of the North Carolina Department of Correction. On the charge of engaging in a sex act by a custodian, defendant received a minimum term of 29 months and a maximum term of 44 months in the custody of the North Carolina Department of Correction, to begin at the expiration of the sentence imposed in the case above. Two of the indecent liberties convictions were consolidated for judgment with the statutory sex offense conviction. For the other two indecent liberties convictions, defendant received a minimum term of 15 months and a maximum term of 18 months in the custody of the North Carolina Department of Correction. The sentence was suspended, and defendant was placed on supervised probation for 36 months upon his release. The trial court also ordered defendant to provide a DNA sample and to pay court costs. Defendant appeals.

II. MOTION TO DISMISS—SEX OFFENSE BY A CUSTODIAN

[1] Defendant first argues the trial court erred in denying his motion to dismiss the charge of sex offense by a custodian. We disagree.

“This Court reviews a trial court’s denial of a motion to dismiss criminal charges *de novo*, to determine ‘whether there is substantial evidence (1) of each essential element of the offense charged, or of a

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lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.' " *State v. Davis*, — N.C. App. —, —, 678 S.E.2d 385, 388 (2009) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "Substantial evidence is evidence that a reasonable mind might find adequate to support a conclusion." *State v. Hargrave*, — N.C. App. —, —, 680 S.E.2d 254, 261 (2009). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom[.]" *Powell*, 299 N.C. at 99, 261 S.E.2d at 117.

The charge of sex offense by a custodian is defined in pertinent part as:

If . . . a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

N.C. Gen. Stat. § 14-27.7(a) (2007). In the instant case, the State presented substantial evidence on each and every element of N.C. Gen. Stat. § 14-27.7(a) and that defendant was the perpetrator. During the relevant period, defendant was employed by Kingspoint, a corporation, at a boys' group home. At that time, Kelsey was living at a girls' group home operated by Kingspoint. Kelsey performed fellatio on defendant while he worked at his job with Kingspoint.

Defendant further argues the trial court erred in denying his motion to dismiss because the State failed to show defendant knew or should have known Kelsey was in Kingspoint's custody. Defendant believes that knowledge that he was the custodian should be a requirement of the charge of sex offense by a custodian. We disagree.

In construing a statute, it is the duty of the court to "carry out the intent of the legislature." *State v. Ward*, 46 N.C. App. 200, 206, 264 S.E.2d 737, 741 (1980); *State v. Hales*, 256 N.C. 27, 30, 122 S.E.2d 768, 771 (1961); *State v. Hudson*, 11 N.C. App. 712, 182 S.E.2d 198 (1971); *United States v. Jones*, 471 F.3d 535, 539 (4th Cir. 2006) (determining the mental state required for the commission of a crime requires construction of the statute and inferring the intent of the legislature). "The first step in determining a statute's purpose is to examine the

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statute's plain language." *State v. Hooper*, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004). "As a cardinal principle of statutory interpretation, '[i]f the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms.'" *State v. Watterson*, — N.C. App. —, —, 679 S.E.2d 897, 900 (2009) (quoting *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993)).

The legislature's purpose in enacting N.C. Gen. Stat. § 14-27.7 was "prevention of sexual abuse by institutional personnel of persons in an institution's care." *State v. Raines*, 319 N.C. 258, 262, 354 S.E.2d 486, 489 (1987); see also *Outmezguine v. State*, 97 Md. App. 151, 166, 627 A.2d 541, 548 (1993) (holding that such laws are designed to protect children from exploitation and that the general rule is that the victim's status is an element of such an offense but the defendant's knowledge of that status is not). The plain language of N.C. Gen. Stat. § 14-27.7 prohibits sexual contact with certain victims by certain persons (*e.g.*, parents and stepparents, those acting *in loco parentis*, those with custody of the victim, and various school personnel).

According to the plain language of N.C. Gen. Stat. § 14-27.7(a), the State is not required to present evidence that a defendant knew or should have known the victim was in his custody or in the custody of his principal or employer. The legislature has considerable latitude in defining elements of a crime. *State v. Trimble*, 44 N.C. App. 659, 665-66, 262 S.E.2d 299, 303 (1980).

"When a legislative body 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion.'" *N.C. Dept. of Revenue v. Hudson*, — N.C. App. —, —, 675 S.E.2d 709, 711 (2009) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525, 107 S.Ct. 1391, 1393, 94 L. Ed. 2d 533, 537 (1987)).

It appears our legislature did not include knowledge of the victim's status as one of the required elements or conditions in the statute. In *State v. Oakley*, this Court set out the elements of N.C. Gen. Stat. § 14-27.7(a) in the context of a defendant charged with sexual activity by a substitute parent. 167 N.C. App. 318, 322, 605 S.E.2d 215, 218 (2004). "This crime requires a finding that the defendant had (1) assumed the position of a parent in the home, (2) of a minor victim, and (3) engaged in a sexual act with the victim residing in the

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home.” *Id.* The *Oakley* Court clearly did not include the element of knowledge as a requirement and did not discuss the element of knowledge of the victim’s status or condition.

In portions of N.C. Gen. Stat. § 14-27.1 (2007) *et seq.*, titled “Rape and Other Sex Offenses,” our legislature included statutes which clearly include the element of knowledge as a requirement. For example, a person is guilty of second degree rape if he has vaginal intercourse with a person “[w]ho is mentally disabled, mentally incapacitated, or physically helpless, *and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.*” N.C. Gen. Stat. § 14-27.3(a)(2) (2007) (emphasis added).

Further support for statutes that do not include the element of knowledge in offenses similar to the one in the instant case can be found in other jurisdictions. In addition to North Carolina, more than “[f]orty jurisdictions have at least one criminal provision outlawing the abuse of a position of power to obtain sexual intercourse.” Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39, 102 (1998); *see* ALA CODE § 14-11-31 (LexisNexis 2008); ALASKA STAT. § 11.41.434 (2008); ARIZ. REV. STAT. ANN. § 13-1419 (2008); ARK. CODE ANN. §§ 5-14-110, 124, 125, 126, 127 (2009); CAL. PENAL CODE § 289.6 (West 2009); COLO. REV. STAT. § 18-3-405.3 (2009); CONN. GEN. STAT. ANN. § 53a-71 (West 2009); DEL. CODE ANN. tit. 11, §§ 769, 770, 772, 773 (2008); D.C. CODE §§ 22-3013, 3015 (2009); FLA. STAT. ANN. § 794.011 (West 2009); GA. CODE ANN. § 16-6-5.1 (2009); HAW. REV. STAT. §§ 707-731, 732 (2005); IDAHO CODE ANN. 18-6110 (2009); ILL. COMP. STAT. ANN. 5/12-13 (West 2009); IND. CODE ANN. § 35-42-4-7 (LexisNexis 2009); IOWA CODE ANN. § 709.4 (West 2009); KAN. STAT. ANN. § 21-3520 (2008); KY. REV. STAT. ANN. §§ 510.060, 090, 110, 120 (West 2008); ME. REV. STAT. ANN., tit. 17A, § 253 (2008); MD. CODE ANN., Criminal Law § 3-308 (LexisNexis 2009); MASS. GEN. LAWS ANN. ch. 268, § 21A (West 2009); MICH. COMP. LAWS ANN. §§ 750.520b, 520c, 520d, 520e (West 2009); MINN. STAT. ANN. §§ 609.342, 343, 344, 345 (West 2009); MISS. CODE ANN. § 97-3-95 (2009); NEV. REV. STAT. §§ 201.540, 550 (2007); N.H. REV. STAT. ANN. §§ 632-A:2, A:3, A:4 (2008); N.J. STAT. ANN. § 2C:24-4 (West 2009); N.M. STAT. § 30-9-13 (2008); N.Y. PENAL LAW § 130.05 (McKinney 2009); N.D. CENT. CODE §§ 12.1-20-06, 06.1, 07 (2009); OHIO REV. CODE ANN. § 2907.03 (LexisNexis 2009); OKLA. STAT. tit. 21, § 1111 (2008); OR. REV. STAT. § 163.452 (2005); PA. CONS. STAT. ANN. § 3124.2 (West 2009); R.I. GEN. LAWS § 11-25-24 (2008); S.C. CODE ANN. § 16-3-655 (2008); S.D. CODIFIED LAWS § 24-1-26.1 (2003); TENN.

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CODE ANN. §§ 39-13-527, 532 (2009); TEX. PENAL CODE ANN. § 22.011 (Vernon 2009); UTAH CODE ANN. §§ 76-5-404.1, 406 (2008); VT. STAT. ANN. tit. 13, §§ 3252, 3257, 3258 (2009); VA. CODE ANN. § 18.2-370.1 (2009); V.I. CODE ANN. tit. 14, §§ 1700, 1700a, 1708 (2009); WAH. REV. CODE ANN. §§ 9A.44.050, 093, 096, 100 (West 2009); W. VA. CODE ANN. § 61-8D-5 (LexisNexis 2009); WIS. STAT. ANN. § 948.095 (West 2008); WYO. STAT. LAW § 6-2-303(a)(vi) (2009).

In reviewing the statutes from numerous jurisdictions, only three of them include a requirement that the state must prove a defendant knew the victim's status. In Oregon, for the crime of custodial sexual misconduct in the first degree, the state must show that the defendant:

- (a) Engages in sexual intercourse or deviate sexual intercourse with another person or penetrates the vagina, anus or penis of another person with any object other than the penis or mouth of the actor *knowing that the other person is:*
 - (A) In the custody of a law enforcement agency following arrest;
 - (B) Confined or detained in a correctional facility;
 - (C) Participating in an inmate or offender work crew or work release program; or
 - (D) On probation, parole, post-prison supervision or other form of conditional or supervised release; and
- (b) Is employed by or under contract with the state or local agency that:
 - (A) Employs the officer who arrested the other person;
 - (B) Operates the correctional facility in which the other person is confined or detained;
 - (C) Is responsible for supervising the other person in a work crew or work release program or on probation, parole, post-prison supervision or other form of conditional or supervised release; or
 - (D) Engages the other person in work or on-the-job training pursuant to ORS 421.354 (1).

OR. REV. STAT. § 163.452 (2005) (emphasis added). In Vermont, for the crime of sexual exploitation of an inmate:

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(a) No correctional employee, contractor, or other person providing services to offenders on behalf of the department of corrections or pursuant to a court order or in accordance with a condition of parole, probation, supervised community sentence, or furlough shall engage in a sexual act with a person *who the employee, contractor, or other person providing services knows*:

- (1) is confined to a correctional facility; or
- (2) is being supervised by the department of corrections while on parole, probation, supervised community sentence, or furlough, where the employee, contractor, or other service provider is currently engaged in a direct supervisory relationship with the person being supervised. For purposes of this subdivision, a person is engaged in a direct supervisory relationship with a supervisee if the supervisee is assigned to the caseload of that person.

VT. STAT. ANN. tit. 13, § 3257(a)(1), (2) (2009) (emphasis added). In Wyoming, for the crime of sexual assault in the second degree, the state must show that the defendant committed “sexual intrusion” on the victim and, *inter alia*:

(vii) The actor is an employee, independent contractor or volunteer of a state, county, city or town, or privately operated adult or juvenile correctional system, including but not limited to jails, penal institutions, detention centers, juvenile residential or rehabilitative facilities, adult community correctional facilities, secure treatment facilities or work release facilities, *and the victim is known or should be known by the actor to be a resident of such facility or under supervision of the correctional system*[.]

WYO. STAT. ANN § 6-2-303(a)(vii) (2009) (emphasis added).

In the instant case, based on our analysis above, the State was not required to present evidence of defendant’s knowledge of the victim’s status or condition in order to secure a conviction. Defendant’s assignment of error is overruled.

III. MOTION TO DISMISS—INDECENT LIBERTIES WITH A MINOR

[2] Defendant next argues the trial court erred in denying his motion to dismiss his three charges of indecent liberties with a minor in cases 06 CRS 52198, 06 CRS 52199, and 06 CRS 52206. We disagree.

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One count was based on the allegation that defendant fondled Kelsey's breasts. Another count was based on allegations the defendant encouraged, facilitated, and aided Kelsey to engage in sexual acts with Allen and/or Jordan and/or watched Kelsey engage in sexual acts with other juveniles. The third count was based on allegations the defendant encouraged, facilitated, and/or aided Allen to engage in sexual acts with Kelsey and/or watched such sexual acts.

The elements of indecent liberties with a minor are:

(1) the defendant was at least 16 years of age; (2) he was five years older than his victim; (3) he willfully took or attempted to take an indecent liberty with the victim; (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred; and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Thaggard, 168 N.C. App. 263, 282, 608 S.E.2d 774, 786-87 (2005); N.C. Gen. Stat. § 14-202.1 (2007). “[S]exual gratification may be inferred from the evidence relating to the defendant’s actions.” *State v. Ainsworth*, 109 N.C. App. 136, 146, 426 S.E.2d 410, 416 (1993). When an adult who has a custodial relationship with a child watches that child engage in sexual activity with another person or facilitates such activity, the adult’s actions constitute indecent liberties with a minor. *Id.* at 147, 426 S.E.2d at 417.

In the instant case, defendant told Kelsey she had to show her breasts as a condition for her to stay at the boys’ home. Defendant then fondled Kelsey’s breasts and removed her bra. Defendant left Allen’s room and when he returned he saw Kelsey and Allen engaged in sexual intercourse. During this time, defendant repeatedly left and re-entered Allen’s room to watch Kelsey and Allen have sex. At the time of the above incidents, defendant was 40 years old, and Allen and Kelsey were both under 16 years old. Substantial evidence sustained the jury verdicts of guilty of indecent liberties with a minor.

Defendant argues that there was insufficient evidence to support two convictions based on the above stated acts because the two counts were not two separate criminal acts because they arose from a single transaction. We disagree.

In *State v. Laney*, the defendant was convicted of two counts of indecent liberties with a minor. 178 N.C. App. 337, 339, 631 S.E.2d 522, 523 (2006). This Court vacated one conviction because the acts of the defendant—touching the victim’s breasts and then putting his

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hand inside the waistband of her pants while she was in her bed trying to sleep—constituted “one transaction . . . The sole act involved was touching—not two distinct sexual acts.” *Id.* at 341, 631 S.E.2d at 524. Additionally, “there was no gap in time between two incidents of touching” *Id.*

In *State v. Jones*, the defendant was convicted of two counts of indecent liberties with a minor. 172 N.C. App. 308, 309, 616 S.E.2d 15, 17 (2005). This Court vacated one conviction because the defendant committed only one act against the victim. *Id.* at 314-16, 616 S.E.2d at 19-20. The *Jones* Court stated that while “the statute sets out alternative acts that might establish an element of the offense, a single act can support only one conviction.” *Id.* at 315, 613 S.E.2d at 20. However, “multiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties.” *State v. James*, 182 N.C. App. 698, 705, 643 S.E.2d 34, 38 (2007); *State v. Gopal*, 186 N.C. App. 308, 322, 651 S.E.2d 279, 288 n.7 (2007).

In the instant case, there were clearly two separate acts. The first act was a touching that occurred when defendant removed Kelsey’s bra and touched her breasts. The second act was defendant’s watching and facilitating Kelsey’s sexual encounter with Allen. Each of defendant’s acts supports a separate conviction for indecent liberties with a minor. Defendant’s assignments of error are overruled.

IV. JURY INSTRUCTIONS

[3] Defendant argues that the trial court committed reversible error when instructing the jury on finding the defendant guilty or not guilty of the charges against him. We disagree.

Since defendant did not object to the jury instructions at trial, we review for plain error. *State v. Odom*, 307 N.C. 655, 656, 300 S.E.2d 375, 376 (1983). “In deciding whether a defect in the jury instruction constitutes ‘plain error,’ the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury’s finding of guilt.” *Id.* at 661, 300 S.E.2d at 378-79. “[E]ven when the ‘plain error’ rule is applied, ‘[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.’” *Id.* at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L. Ed. 2d 203, 212 (1977)). “This Court has repeatedly held that a *lapsus linguae* not called to the attention of the trial court when made will not constitute prejudicial error when it is

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apparent from a contextual reading of the charge that the jury could not have been misled by the instruction.” *State v. Baker*, 338 N.C. 526, 565, 451 S.E.2d 574, 597 (1994); *State v. Hazelwood*, 187 N.C. App. 94, 101-02, 652 S.E.2d 63, 68 (2007); *State v. Laws*, 325 N.C. 81, 98-99, 381 S.E.2d 609, 620 (1989), *judgment vacated*, 494 U.S. 1022, 110 S.Ct. 1465, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, 502 U.S. 876, 112 S.Ct. 216, 116 L. Ed. 2d 174, *reh’g denied*, 502 U.S. 1001, 112 S.Ct. 627, 116 L. Ed. 2d 648 (1991).

In the instant case, near the beginning of its charge to the jury, the trial court stated:

Now, members of the jury, as you know, we’re trying a number of cases in one trial. There are a total of six cases that you will consider. Each case, members of the jury, will be considered separately and individually as though there were six different trials focusing on that one charge alone. Members of the jury, your verdict in any one case will not affect or be related to the verdict in any of the other five cases. Thus, you may find the defendant guilty on all counts, you may find the defendant guilty on all counts, or you may find the defendant guilty on some counts and not guilty on some counts.

Although the trial court failed, in this portion of its instructions, to instruct the jury that it could find defendant not guilty on all counts, the trial court made this *lapsus linguae* only once and subsequently corrected the charge with further instructions to the jury. In its subsequent instructions on each charge, the trial court stated that there were two possible verdicts in each case—the jury could find the defendant guilty or not guilty. Moreover, when the trial court instructed the jury on the elements of each charge, the court stated that if the jury found from the evidence, beyond a reasonable doubt, that defendant committed the elements of the crimes charged, the jury had a duty to return a verdict of guilty. If the jury did not so find or if it had a reasonable doubt as to one or more of the elements, the jury had a duty to return a verdict of not guilty.

Finally, the trial court stated that, by law, it was required to be impartial and that the jury “should not mistakenly infer or believe that [the trial court has] implied . . . what your findings ought to be.” “The Court has no opinion in these cases.”

In considering all the instructions and the contextual reading of the charge, it appears that the jury would not have reached a different result but for the *lapsus linguae*. In addition, the error was not

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the type of error that was “‘so fundamental as to result in a miscarriage of justice or denial of a fair trial.’” *State v. McNeil*, 165 N.C. App. 777, 784, 600 S.E.2d 31, 36 (2004) (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)). In the instant case, the trial court repeatedly instructed the jury that it could find defendant guilty or not guilty of each of the charges. The trial court also stated that if the jury found the State did not prove one or more elements of a charge, the jury had a duty to return a verdict of not guilty as to that charge. Reviewing the charge in its entirety, we find that the jury could not have been misled by the instructions. Therefore, we hold that the defendant was not prejudiced by the trial court’s *lapsus linguae*. Defendant’s assignment of error is overruled.

[4] Defendant’s final argument is that the trial court’s instruction to the jury regarding the charge of sex by a custodian was incomplete and therefore error. Specifically, defendant believes that the instruction should have included that the jury had to be convinced beyond a reasonable doubt that defendant knew or should have known that the victim (*i.e.*, Kelsey) was in his custody as defined by law at the time of the offense. We disagree.

“A trial judge is required by N.C.G.S. § 15A-1231 and N.C.G.S. § 15A-1232 to instruct the jury on the law arising on the evidence. This includes instruction on the elements of the crime.” *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). Although defendant made a motion to dismiss, he concedes that he did not object to the trial court’s instructions on the charge of sex by a custodian. An examination of the transcript reveals that, when making his motion to dismiss at the close of all the evidence, defendant’s counsel stated, “There’s got to be some knowledge or intent involved in any kind of crime. And if they produce no evidence that he had—and I contend there’s absolutely no evidence that he would have known that these girls were from a Kingspointe [sic] Academy Group Home.” However, defendant made no request for such an instruction at the charge conference. Therefore, we review defendant’s assignment of error under the plain error standard of review. *Odom*, 307 N.C. at 656, 300 S.E.2d at 376; N.C. R. App. P. 10(b)(2) (2009). “A prerequisite to our engaging in a ‘plain error’ analysis is the determination that the instruction complained of constitutes ‘error’ at all.” *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468 (1986). “[W]hen the request is *correct in law* and supported by the evidence, the court must give the instruction in substance.” *State v. Ball*, 324 N.C. 233, 238, 377 S.E.2d 70, 73 (1989) (emphasis added).

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Since we have determined that defendant's knowledge that the victim was in his custody was not a required element of the charge of sex offense by a custodian, the trial court did not err in failing to include that the defendant knew or should have known that the victim was in his custody in its instruction to the jury. Assuming *arguendo* the defendant had requested such an instruction, since it would not have been "correct in law," the trial court would not have been required to give such an instruction. *Ball*, 324 N.C. at 238, 377 S.E.2d at 73. Defendant's assignment of error is overruled.

V. CONCLUSION

Defendant has failed to bring forth any argument regarding his remaining assignments of error. As such, we deem these assignments of error abandoned pursuant to N.C. R. App. P. 28(b)(6) (2009).

We find no error.

No error.

Judges WYNN and ELMORE concur.

STATE OF NORTH CAROLINA v. KAREEM MICHAEL LAMONT ALLEN

No. COA09-344

(Filed 3 November 2009)

1. Confessions and Incriminating Statements— motion to suppress—statements at hospital

The trial court did not err in a second-degree murder case by denying defendant's motion to suppress his statement to police at a hospital. Defendant was not subjected to a custodial interrogation since the atmosphere and physical surroundings during the questioning manifested a lack of restraint or compulsion and any restraint on defendant's movement was due to his medical treatment and not the actions of the police officers.

2. Confessions and Incriminating Statements— motion to suppress—statements at police station

The trial court did not err in a second-degree murder case by denying defendant's motion to suppress his statement because merely stating the charges brought against a defendant is

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not an interrogation and defendant initiated the communication with the detective.

3. Criminal Law— instructions—flight

The trial court did not err in a second-degree murder case by instructing the jury on flight because the evidence was sufficient to support the theory that defendant fled the scene to avoid apprehension. Even assuming *arguendo* there was insufficient evidence to support a flight instruction, defendant failed to show prejudice in light of the overwhelming evidence presented at trial that defendant was the perpetrator.

4. Sentencing— presumptive range—findings of aggravation and mitigation not required

The trial court did not err in a second-degree murder case by allegedly considering the fact that defendant rejected a plea offer when determining his sentence because the trial court did not make any comments pertaining to defendant's rejection of the plea offer and defendant's sentence in the presumptive range is presumed valid.

Appeal by defendant from judgment entered 9 September 2008 by Judge W. Allen Cobb in New Hanover County Superior Court. Heard in the Court of Appeals 16 September 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Kathryn L. VandenBerg, for defendant-appellant.

STEELMAN, Judge.

Where the trial court's findings of fact support its conclusion of law that defendant was not in custody when he was treated in the hospital and answered questions posed by officers investigating the dispute in which he had been involved, the trial court properly denied his motion to suppress the statements. Where an officer merely stated the charges being brought against defendant after he had invoked his constitutional right to counsel, it is not an "interrogation" and the trial court properly denied defendant's motion to suppress any volunteered statements by defendant. Where there was some evidence in the record supporting the theory that defendant fled the scene after a deadly altercation, the trial court did not err in instructing the jury on flight. Defendant failed to show that the trial court

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considered that he rejected a plea offer from the State in imposing a presumptive range sentence.

I. Factual and Procedural Background

At approximately 2:00 p.m. on 26 July 2006, Kareem Allen (defendant) met Ian Franks (Franks) on the corner of 11th and Meares Streets in Wilmington, North Carolina and went to the back seat of Franks's vehicle. Defendant inquired into the whereabouts of the CDs and DVD he had left in Franks's vehicle the previous day. Franks responded, "they should be in here where you left them[.]" Defendant asked Franks to drop him off on "12th and Wright." Franks complied with defendant's request and defendant exited the vehicle. Franks threw defendant's CDs that were in his vehicle on the ground and drove away.

At approximately 2:30 p.m., defendant walked to a convenience store and called Franks two or three times. Defendant asked Franks to meet him at the store so the two could fight. As defendant waited for Franks to arrive for approximately twenty minutes, he drank two energy drinks and did pushups to "pump himself up for fighting[.]" When Franks arrived at the convenience store, defendant demanded "Where[']s my CD at?" Franks responded that he was not responsible for anything defendant had left in his car, but offered to pay for the missing CD and DVD. Defendant reached into Franks's vehicle to retrieve a \$20.00 bill and Franks "started swinging[.]" Defendant pushed Franks back and Franks stabbed him twice in the arm with a knife. Franks exited his vehicle and ran away.

Defendant chased Franks, and grabbed his shirt with his left hand and stabbed Franks in the back. Franks spun around and the two started "tussling." Franks was stabbed three more times. Defendant dropped his knife and ran down the street. Franks ran into the convenience store and collapsed. The store clerk called 911 and performed CPR. Paramedics arrived and could not detect a pulse. Franks was transported to New Hanover Regional Medical Center by ambulance and the Center's trauma team attempted to resuscitate him. Franks died from the injuries inflicted by defendant. An autopsy revealed that Franks had three superficial stab wounds to his chest and back and one fatal stab wound that perforated his heart.

Defendant ran towards 7th Street. He spotted his friend Gerric and got into his vehicle. They saw the vehicle of defendant's mother, and flagged her down. His mother drove him to the New Hanover Regional Medical Center emergency room.

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Officer Sean Smith (Officer Smith) of the Wilmington Police Department heard about the incident and the description of the suspect over the radio. Officer Smith and his partner believed defendant fit the description and attempted to find his mother, Latonya Allen (Allen). Officer Smith visited Allen's workplace and left a business card for her with his mobile telephone number. Shortly thereafter, Allen called Officer Smith and told him that they were at the emergency room because defendant had been cut. Officer Smith met Allen at the hospital and she led him to the holding area where defendant was being treated. Officer Smith asked defendant what had happened. Defendant initially responded that he had been in a fight over a DVD and had been stabbed. Other officers arrived at the hospital. Upon defendant's discharge from the hospital, Officer Smith transported him to the police station. Defendant gave a statement to police detailing the altercation.

On 27 November 2006, defendant was indicted for second degree murder. Prior to trial on 23 April 2008, defendant filed two separate motions to suppress his statements made to officers at the hospital and at the police station. Following a two-day suppression hearing before the Honorable Charles H. Henry, these motions were denied. On 9 September 2008, a jury found defendant guilty of second degree murder. The trial court found defendant to be a prior record level IV for felony sentencing purposes and sentenced defendant to an active prison term of 240 to 297 months. Defendant appeals.

II. Motions to Suppress**A. Standard of Review**

The standard of review of a denial of a motion to suppress is well-established:

On review of a motion to suppress evidence, an appellate court determines whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law. The trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." The conclusions of law, however, are reviewed *de novo*.

State v. Haislip, 362 N.C. 499, 499-500, 666 S.E.2d 757, 758 (2008) (internal citation and quotation omitted). Where a defendant fails to challenge any of the trial court's findings of fact relating to the motion, our review is limited to whether the trial court's findings

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of fact support its conclusions of law. *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000).

B. Hospital Statement

[1] In his first argument, defendant contends the trial court erred by denying his motion to suppress his statement to police at the hospital arguing that he was subjected to a custodial interrogation and had not been advised of his *Miranda* rights. We disagree.

“[F]ailure to administer *Miranda* warnings in ‘custodial situations’ creates a presumption of compulsion which would exclude statements of a defendant. Therefore, the initial inquiry in determining whether *Miranda* warnings were required is whether an individual was ‘in custody.’ ” *State v. Buchanan*, 353 N.C. 332, 336-37, 543 S.E.2d 823, 826 (2001) (internal citation omitted). “[I]n determining whether a suspect was in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest.” *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (citation omitted), *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). This determination is based upon “the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.” *State v. Garcia*, 358 N.C. 382, 396, 597 S.E.2d 724, 736 (2004) (quotation omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). Our analysis focuses upon whether a reasonable person in defendant’s position would believe that they were under arrest or significantly restrained in their movement. *Id.*

Defendant only challenges a portion of two of the trial court’s findings of fact: (1) that Officer Smith did not attempt to place defendant in custody and (2) that when speaking with Detective Craig at the hospital, defendant “had not been arrested and was not in custody.” Although the trial court made “findings” that defendant was not in custody when he was questioned at the hospital, these are actually conclusions of law, which are reviewed *de novo*. *State v. Kemmerlin*, 356 N.C. 446, 456, 573 S.E.2d 870, 880 (2002).

This Court has previously addressed the issue of whether a defendant was in custody while being treated at a hospital. *See e.g.*, *State v. Fuller*, 166 N.C. App. 548, 603 S.E.2d 569 (2004); *State v. Patterson*, 146 N.C. App. 113, 552 S.E.2d 246, *disc. review denied*, 354 N.C. 578, 559 S.E.2d 549 (2001); *State v. Gwaltney*, 31 N.C. App. 240,

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228 S.E.2d 764, *disc. review denied and appeal dismissed*, 291 N.C. 449, 230 S.E.2d 767 (1976); *State v. Thomas*, 22 N.C. App. 206, 206 S.E.2d 390, *appeal dismissed*, 285 N.C. 763, 209 S.E.2d 287 (1974). Factors to be considered in whether the questioning of a defendant in a hospital constituted a custodial interrogation include: (1) whether the defendant was free to go at his pleasure; (2) whether the defendant was coherent in thought and speech, and not under the influence of drugs or alcohol; and (3) whether officers intended to arrest the defendant. *Fuller*, 166 N.C. App. at 557, 603 S.E.2d at 576 (citing *Thomas*, 22 N.C. App. at 210, 206 S.E.2d at 392)). This Court has also made a distinction between questioning that is accusatory and that which is investigatory. *Gwaltney*, 31 N.C. App. at 242, 228 S.E.2d at 765; *see also Buchanan*, 353 N.C. at 337, 543 S.E.2d at 827 (“[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question.” (quotation omitted) (emphasis added))).

In the instant case, the evidence presented at the suppression hearing tends to show that defendant's mother informed Officer Smith that defendant was in the emergency room because he had been cut. Officer Smith and his partner were the first officers to arrive at the hospital. Officer Smith spoke to defendant to find out “what happened.” At that time, Officer Smith did not know the reason for the fight. Defendant could understand Officer Smith and spoke clearly. Detective Craig subsequently arrived at the hospital with the knowledge that two persons were involved in an altercation, and that one individual was in the operating room and the other was in the emergency room. Detective Craig spoke to defendant about what had happened intermittently for about forty minutes. Detective Craig would periodically stop the conversation and leave the area so that medical personnel could treat defendant. Detective Craig's purpose in questioning defendant was to find out “what had happened out there.”

Defendant advised Detective Craig that he and Franks had been involved in an argument over some CDs and a DVD movie, and as a result Franks pulled a knife on defendant and cut his wrist and arm. Defendant further stated that he stabbed Franks in retaliation. During these discussions, defendant was not under the influence of drugs or alcohol and clearly understood the questions being asked. Defendant did not cry out in pain, lose consciousness, or request pain medication. Defendant did not decline to answer any questions and did not display any anger toward the officers. Defendant was not handcuffed, nor was he told that he could not leave or that he was under arrest.

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Further, defendant did not ask the officers to leave or request contact with his family members.¹

While at the hospital, the officers present were notified that Franks had died. Detectives Michael Overton and Craig, and Officer Smith determined that they had probable cause to arrest defendant. After receiving treatment, defendant was advised that he was going to be transported to the Wilmington Police Department. Five officers were present when defendant was discharged. Defendant was not placed under arrest at that time, but he could not leave the hospital on his own. All of the challenged statements were made prior to defendant's transport to the police station. No statements were made during the transport.

The trial court entered nine findings of fact pertaining to the circumstances surrounding defendant's statements at the hospital, all of which were consistent with the evidence presented at the suppression hearing.

Considering the totality of the circumstances present while defendant was questioned in the hospital, we hold "these facts do not constitute 'custodial interrogation' since the atmosphere and physical surroundings during the questioning manifest a lack of restraint or compulsion." *Thomas*, 22 N.C. App. at 211, 206 S.E.2d at 393. Any restraint in movement defendant may have experienced at the hospital was due to his medical treatment and not the actions of the police officers. Evidence presented at the suppression hearing supports the trial court's findings of fact, which in turn support its conclusions of law that defendant was not in custody at the hospital. The trial court did not err by denying defendant's motion to suppress his hospital statements. This argument is without merit.

1. Defendant's argument largely focuses on the assertion that he was "prevented from seeing his family." However, defendant never requested to see his family. At the suppression hearing, defendant's mother testified that she attempted to see defendant several times while he was being treated, but that either Detective Overton or Officer Smith informed her that no one was allowed in that area. Defendant also asserts that Katrina Allen, defendant's sister, asked permission to see him when she first arrived. Hospital staff told her she would have to wait because nurses were putting in an IV. Katrina testified that officers arrived shortly thereafter and asked everyone to leave the room. Katrina once again sought permission to see defendant, but *a member of the hospital staff* denied this request, not police officers. However, this was Katrina's trial testimony and was not presented to the trial court during the suppression hearing. Defendant was never aware of his mother's or Katrina's requests to see him. We do not consider circumstances that a defendant is unaware of in determining whether a reasonable person in defendant's position would believe that they were under arrest or significantly restrained in their movement.

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C. Statement at the Police Station

[2] In his second argument, defendant contends the trial court erred by denying his motion to suppress his statement given at the police station arguing that it was wrongfully elicited after he had invoked his right to counsel. We disagree.

“Once an accused invokes his right to counsel during a custodial interrogation, ‘the interrogation must cease and cannot be resumed without an attorney being present unless the accused himself initiates further communication, exchanges, or conversations with the police.’” *State v. Fisher*, 158 N.C. App. 133, 142, 580 S.E.2d 405, 413 (2003) (quotation and emphasis omitted), *aff’d per curiam*, 358 N.C. 215, 593 S.E.2d 583 (2004). Custodial interrogation “is not limited to express questioning by law enforcement officers, but also includes ‘any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.’” *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000) (quotation omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

Factors that are relevant to the determination of whether police “should have known” their conduct was likely to elicit an incriminating response include: (1) “the intent of the police”; (2) whether the “practice is designed to elicit an incriminating response from the accused”; and (3) “[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion”

Fisher, 158 N.C. App. at 142-43, 580 S.E.2d at 413 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 302 n.7, 8, 64 L. Ed. 2d 297, 308 n. 7, 8 (1980)).

In its order denying defendant’s motion to suppress, the trial court made the following unchallenged findings of fact pertaining to the circumstances leading up to defendant’s statement at the police station:

10. Once the defendant arrived at the Wilmington Police Department shortly before 6 p.m., he was ushered to an interview room which had video and audio facilities which recorded the events from the time he entered. The defendant was in custody under arrest at that time and was wearing handcuffs.

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11. The defendant was advised, at least partially, of his *Miranda* rights by Detective Craig. No interrogation took place in the interview room prior to the reading of those rights. After being advised of his right to have an attorney present during questioning, the defendant advised Detective Craig that he wanted attorney Geoff Hosford present before he answered any questions.

12. As a result, [D]etective Craig left the interview room and attempted to call attorney Hosford. Several attempts to reach Hosford at his office were unsuccessful. An attempt to call Hosford's law partner to get a cell phone number was also not successful. A message with phone numbers to call was left on Hosford's answering service by [D]etective Craig.

13. While Craig was outside of the interview room during that fourteen minute period that followed the defendant's request for an attorney, Detective Craig spoke to District Attorney Ben David and Assistant District Attorney Jon David, who had arrived at the Wilmington Police Department, after being advised of the incident.

14. After speaking to the district attorney, Craig went back into the interview room. Immediately upon entry into the room, the following exchange took place:

Craig: You don't have Geoff's number or anything? I called his office. Of course, it's just an answering machine, I can't find find [sic] . . . I know where he lives, but I can't get 'ahold' of him.

Allen: I ain't got his cell phone.

Craig: Okay, well, right now, all right, I mean, I ain't trying to ask you questions, I'm trying to get 'ahold' of your attorney. Right now you're being detained. You're being charged with second degree murder.

Allen: He died? Huh?

Craig: Yes, he died. You're being charged with second degree murder, so just hold tight.

Allen: Wow. But listen, though. Well, can I talk to you . . . can I talk to you without him till tomorrow?

Craig: I mean, that's your right, partner. Okay? But you asked for him, so if you want to talk to me . . .

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Allen: I'll talk to you right now.

Craig: Okay, you want to talk to me without your attorney present?

Allen: For right now.

Craig: All right. Hold tight.

[Craig leaves the room for approximately one minute and ten seconds. Upon reentering the room the dialogue continues]:

Craig: Now, just to reiterate . . .

Allen: Can I talk to you right now. I didn't know it was that bad.

Craig: Well, hold on. Before I can talk to you, I need to read you your rights again. I've got to make sure. You want to talk to me without your lawyer being present right?

Allen: For right now because you can't get in touch with him.

Craig: For right now this is what you want to do?

Allen: Right.²

15. The defendant was reread his Constitutional rights mandated by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) by Detective Craig from a written department form. . . . The defendant waived his rights and agreed to answer questions without his attorney being present.

. . .

16. The defendant during the approximate sixty-seven minutes of questioning by the officers described and demonstrated what occurred between him and the decedent during the early afternoon of July 26, 2006. . . .

In his brief, defendant concedes that he "does not dispute" any of the trial court's findings of fact on this issue. However, defendant argues that the act of telling him Franks had died "was an improper and deliberate attempt to elicit a response from [defendant], in violation of his Sixth Amendment right to counsel." This assertion mischaracterizes Detective Craig's conduct. As is recited above, Detective Craig reentered the interview room, informed defendant that they were un-

2. The trial court's recitation of the conversation between Detective Craig and defendant is an exact transcription of what appears on the recording submitted to this Court.

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able to reach his attorney, and stated that defendant was being charged with second degree murder. This Court has held that merely stating the charges brought against a defendant does not equate to an “interrogation.” *State v. Leak*, 90 N.C. App. 351, 355-56, 368 S.E.2d 430, 433 (1988). In *Leak*, the defendant was read his *Miranda* rights and he chose to invoke his right to counsel. *Id.* at 353, 368 S.E.2d at 432. The arresting officer then started to give the defendant copies of each warrant and began telling defendant the offenses with which he was charged. *Id.* While this occurred, the defendant stated that he wanted to tell his side of the story and made an inculpatory statement. *Id.* This Court held:

defendant initiated the further communication. The only statements by the officer concerned the nature of the charges against defendant. These statements cannot be said to be an interrogation for “‘interrogation’ under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (*other than those normally attendant to arrest and custody*) that the police should know are reasonably likely to elicit an incriminating response from the suspect.”

Id. at 355-56, 368 S.E.2d at 433 (quotation omitted). The facts of the instant case are materially indistinguishable from those presented in *Leak*. Defendant initiated the communication with Detective Craig. Therefore, defendant’s argument that Detective Craig wrongfully elicited a response after he had invoked his right to counsel is without merit.

III. Flight Instruction

[3] In his third argument, defendant contends the trial court erred by instructing the jury on flight. We disagree.

“[O]ur courts have long held that a trial court may not instruct a jury on defendant’s flight ‘unless there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.’” *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (quotation and citation omitted). “[M]ere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension.” *State v. Westall*, 116 N.C. App. 534, 549, 449 S.E.2d 24, 33, *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994). Our Supreme Court has held that “[e]vidence that the defendant hurriedly left the crime scene without

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rendering assistance to the homicide victim may warrant an instruction on flight.” *State v. Taylor*, 362 N.C. 514, 540, 669 S.E.2d 239, 262 (2008) (citation omitted).

Immediately after defendant stabbed Franks, defendant fled the area and ran towards 8th Street. Defendant did not render any assistance to Franks before he fled. Detective Overton’s police report states that defendant told him that he “threw his knife away as he ran from the scene.” Investigating officers found an open “folding knife” in a storm drain located near the crime scene. We hold this evidence was sufficient to support the theory that defendant fled the scene to “avoid apprehension” after he stabbed Franks.

Even assuming *arguendo* there was insufficient evidence in the record to support a flight instruction, defendant must still demonstrate that the instructional error was prejudicial. See *State v. Glynn*, 178 N.C. App. 689, 693, 632 S.E.2d 551, 554, (“[I]t is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.” (quotation omitted)), *disc. review denied and appeal dismissed*, 360 N.C. 651, 637 S.E.2d 180 (2006). In light of the overwhelming evidence presented at trial that defendant was the perpetrator responsible for Franks’s death, including his confession at the police station and his testimony at trial, defendant cannot demonstrate that any error in the trial court’s instruction to the jury was prejudicial. This argument is without merit.

IV. Sentencing Hearing

[4] In his fourth argument, defendant contends the trial court erroneously considered the fact that defendant rejected a plea offer when determining his sentence. We disagree.

“If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant’s rights.” *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987) (quotation omitted). “Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the [S]tate and insisted on a trial by jury, defendant’s constitutional right to trial by jury has been abridged, and a new sentencing

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hearing must result.” *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990) (emphasis added).

Defendant’s argument centers on a portion of the prosecutor’s comments during defendant’s sentencing hearing. Several times during the hearing, the prosecutor mentioned defendant’s failure to accept the State’s plea offer and requested the trial court sentence defendant “in the high end of the presumptive range for a B-2 felony which is 251 months minimum to 311 months maximum.” When the prosecutor first stated that the State had offered defendant a plea, defense counsel objected and the trial court overruled that objection. On this basis alone, defendant argues the trial court took defendant’s rejection of the plea offer into consideration when determining his sentence. However, it is well-established that the trial court is presumed to disregard incompetent evidence when rendering its decisions. *See generally State v. Allen*, 322 N.C. 176, 185, 367 S.E.2d 626, 631 (1988) (“The presumption in non-jury trials is that the court disregards incompetent evidence in making its decision.”).

Further, the trial court did not make any comments pertaining to defendant’s rejection of the plea offer. After hearing both parties’ arguments, the trial court found defendant to be a prior record level IV and sentenced him within the presumptive range to an active prison sentence of a minimum of 240 to a maximum of 297 months, a lower sentence than was requested by the State. No other comments were made. It is well-established that where the trial court sentences a defendant within the presumptive range there is a rebuttable presumption that the sentence is valid. *Johnson*, 320 N.C. at 753, 360 S.E.2d at 681.

Defendant also argues the trial court should not have imposed such a high presumptive range sentence based on the presence of several mitigating factors. However, “a trial court is not required to justify a decision to sentence a defendant within the presumptive range by making findings of aggravation and mitigation.” *State v. Campbell*, 133 N.C. App. 531, 542, 515 S.E.2d 732, 739, *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999); *see also* N.C. Gen. Stat. § 15A-1340.16(c) (2007) (providing that “[t]he court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2).”). In its discretion, the trial court sentenced defendant in the presumptive range regardless of any mitigating factors present. Defendant is not entitled to a new sentencing hearing. *See Johnson*, 320 N.C. App. at 753, 360 S.E.2d at

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681 (holding that where “the record reveals no such express indication of improper motivation” in sentencing a defendant, a new sentencing hearing is not warranted). This argument is without merit.

NO ERROR.

Judges McGEE and JACKSON concur.

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No. COA08-1326

(Filed 3 November 2009)

Declaratory Judgments— motion to dismiss—sufficiency of evidence

The trial court did not err by granting defendants’ Rule 12(b)(6) motion to dismiss plaintiff’s declaratory judgment action requesting the production of certain records under N.C.G.S. § 132-9(a) where defendants reviewed their records, produced all responsive public records, and requested that plaintiff provide a list of specific information they believed to be missing.

Judge ELMORE dissenting.

Appeal by Plaintiff from judgment entered 21 July 2008 by Judge James E. Hardin in Wake County Superior Court. Heard in the Court of Appeals 21 May 2009.

Blanchard, Miller, Lewis and Styers, P.A. by E. Hardy Lewis and Karen M. Kemerait, for Plaintiff-Appellants.

Shanahan Law Group, PLLC, by Kieran J. Shanahan and Steven K. McCallister; and Department of State Treasurer, by Jay J. Chaudhuri.

BEASLEY, Judge.

Plaintiff appeals from an order dismissing Plaintiff’s complaint for failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. For the reasons stated below, we affirm.

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Plaintiff is a nonprofit corporation incorporated in North Carolina, whose purposes include promoting the best interests and welfare of current, retired, and future employees of the State of North Carolina. On 1 February 2008, Plaintiff filed a complaint against North Carolina Department of State Treasurer (Defendant Department) and Richard H. Moore (Defendant Moore), Treasurer of the State of North Carolina (collectively Defendants). Under N.C. Gen. Stat. § 132-1 through 132-10, Plaintiff made a request for documents under public records law.

The complaint alleged that the 12 March 2007 issue of *Forbes* magazine published an article entitled “Pensions, Pols and Payola.” The article:

insinuat[ed] that the Defendant Moore had instituted a “pay for play” system over investment decisions as sole fiduciary for the \$73 billion in the state retirement system, had initially failed to provide public record information about the identity and payments to individual investment fund managers hired or retained by his office, had hired a private law firm to handle *Forbes*’ inquiries, and only handed over those records after *Forbes* threatened him with a lawsuit.

Based on the information provided in the *Forbes* article, Plaintiff’s Executive Director, on behalf of Plaintiff, wrote a letter to Defendant Moore on 1 March 2007. The letter requested the following information:

1. All documents from the Office of State Treasurer and the law firm retained regarding the dispute with *Forbes* over the magazine’s request for information and the documents provided to *Forbes*.
2. A complete accounting of how the law firm was paid and the total cost to taxpayers.
3. All investment reports that your office has been required during your tenure to file with the legislature under GS 147-69.3(h)-(i), any other investment reports that have been required to be publicly filed under state law and identification of such reports that have not been filed.
4. A list of all current investment managers, their performance by year (or total time if shorter than a year) and the total fee amounts being paid by your office.

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In response to the March 2007 letter, Defendant Moore met with Plaintiff's Board of Governors, delivered to them 700 pages of public documents, and gave a presentation on those documents and the status of the pension fund. Plaintiff believed that the documents provided by Defendant Moore were incomplete and did not fully satisfy the March 2007 letter's request. On 16 October 2007, Plaintiff wrote a second letter to Defendant Moore. Plaintiff requested the following records, in addition to the records requested in the first letter:

1. All private equity, hedge fund or real estate investments made or maintained by the Treasurer's Office on behalf of the state's pension funds since January 1, 2001. Please provide records that show the following information for each year that the investment was maintained by the Treasurer's Office:
 - a. Name of the fund or partnership
 - b. Name of the principals, fund managers and general partners
 - c. Date of the initial commitment, initial investment and any follow-[up] communications
 - d. Amount of capital committed and the actual amount of funds paid
 - e. Cash paid out
 - f. Remaining or estimated value
 - g. Internal rate of return
 - h. Investment multiple or return on capital
2. Records that show the fees paid to each external investment manager for the state's pension funds, including brokers, private equity managers, hedge fund managers and real estate investment managers since January 6, 2001. Please provide records that show the fees paid on an annual or monthly basis.
3. Records that show the fees paid to each broker, bank or other financial institution that manages or holds the investments, cash and/or deposits in the Cash Management Program from January 6, 2001, to the present. Please provide records that show the fees paid on an annual or monthly basis.
4. Records that show all stocks held each year by the state retirement system (including externally managed funds) administered by the State Treasurer from January 6, 2001, to the present.

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5. Records that show the identity of each person who has served on the State Treasurer's investment committee since January 6, 2001. Please provide records that show the dates of service for each advisor, including any SEC investment advisor, registration forms or form ADV's provided to or retrieved by the State Treasurer's Office.

Plaintiff wrote a third letter to Defendant Moore on 6 December 2007, warning that if Defendant Moore did not supply the requested documents by 31 December 2007, Plaintiff would take "appropriate legal action to require your compliance with the Public Records Act." After the 6 December 2007 letter, Plaintiff and Defendants exchanged six additional letters between 21 December 2007 and 24 January 2008. In a 21 December 2007 letter, Defendants communicated to Plaintiff that they believed their production of the more than 700 documents had fully satisfied Plaintiff's 1 March 2007 request, and that if Plaintiff believed that there were "still outstanding documents from [their] requests", it should provide Defendants with a list of specific information it desired.

In February 2008, Plaintiff filed a complaint alleging that Defendants had violated the North Carolina Public Records Act, set out in N.C. Gen. Stat. § 132-1 *et seq.* Plaintiff sought a declaratory judgment that the requested records be deemed public records under N.C. Gen. Stat. § 132-1 and an order requiring Defendants to produce the requested records to Plaintiff under N.C. Gen. Stat. § 132-9(a). In March 2008, Defendants filed an answer seeking dismissal of Plaintiff's claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. In July 2008, the trial court entered an order granting Defendants' motion to dismiss and dismissing Plaintiff's complaint. From this order, Plaintiff appeals.

Plaintiff argues that the trial court erred in granting Defendants' Rule 12(b)(6) motion to dismiss because Plaintiff's complaint alleged all necessary elements to state a claim for production of records under the Public Records Act. For the reasons stated below, we disagree.

On appellate review, we must determine whether:

as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted. Dismissal under Rule 12(b)(6) is proper when one of the following three

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conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wood v. Guilford Cty., 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citations omitted). "In analyzing the complaint under Rule 12(b)(6), the complaint must be liberally construed." *George v. Administrative Office of the Courts*, 142 N.C. App. 479, 481-82, 542 S.E.2d 699, 701 (2001). We review the trial court's decision *de novo*. *Id.*

Plaintiff alleged in their complaint, that Defendants had "failed to provide copies of a significant portion of the public records requested in [the 1 March 2007 letter] and practically all of the public records requested in [the 16 October 2007] letter." The Public Records Act:

codified in sections 132-1 *et seq.* of the North Carolina General Statutes "affords the public a broad right of access to records in the possession of public agencies and their officials." . . . [It] permits public access to all public records in an agency's possession "unless either the agency or the record is specifically exempted from the statute's mandate."

Gannett Pacific Corp. v. N.C. State Bureau of Investigation, 164 N.C. App. 154, 156, 595 S.E.2d 162, 163-64 (2004) (quoting *Times-News Publishing Co. v. State of N.C.*, 124 N.C. App. 175, 177, 476 S.E.2d 450, 451-52 (1996)). In a claim under the Public Records Act,:

[t]he burden is on the [Defendants] to comply with Plaintiff's request by reviewing its records and releasing all information relating to [Plaintiff's request] defined as public records. If, after reviewing its records, [Defendants] determine[] it does not have custody of any information classified as public records, denial of Plaintiff's request may be appropriate. Before this determination is made, however, dismissal of Plaintiffs' complaint is premature.

Id. at 159, 595 S.E.2d at 165.

In the present case, Defendants alleged in their answer that they had reviewed their records and produced all responsive public records, amounting to over 2,000 pages. Defendants also alleged that other documents were "excepted from Plaintiff's public records request as 'trade secrets' within the meaning of N.C. Gen. Stat. § § 132-1.2(1)a and 66-152(3)[.]" Defendants delivered numerous doc-

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uments to Plaintiff, met with Plaintiff to offer an explanation of the records that were produced, and requested that Plaintiff provide a list of specific items that they believed were missing. After Defendants reviewed their records to determine which records were public, it was reasonable for Defendants to deny Plaintiff's requests regarding the public records that were not in their possession and records which contained trade secrets and therefore were within the public records exception.

We hold that the face of Plaintiff's complaint failed to state sufficient facts to make a valid claim under the Public Records Act. The complaint did not allege that Defendants were in possession of any particular public records that were being wrongfully withheld from Plaintiff, but merely alleged that Defendants had failed to provide portions of the requested public records. Because Defendants reviewed their records and requested that Plaintiff provide a list of specific information they believed to be missing, Defendants met their burden. The granting of Defendants' Rule 12(b)(6) motion was not premature.

The dissent contends that "the majority's interpretation of the elements of a legitimate claim under the Public Records Act is inconsistent with our holding in *Gannett Pacific Corp. v. N.C. State Bureau of Investigation*, 164 N.C. App. 154, 595 S.E.2d 162 (2004)." We hold that the procedures followed by Defendants were consistent with the procedures contemplated by *Gannett*. Defendants fully complied by reviewing and releasing all public records that were in their custody, pursuant to Plaintiff's requests. The dissent also believes that the definition of "public records" does not include a "possession" requirement. N.C. Gen. Stat. § 132-6(a) (2007) states that "[e]very custodian of public records shall permit any record in the *custodian's custody* to be inspected and examined. . . ." (emphasis added). Accordingly, the plain language of the statute suggests that a custodian of public records is required to only produce public records in their *custody*. We hold that although Plaintiff did not have the burden of showing Defendants' possession of the requested public records, Defendants correctly reviewed their records, determined which public records were in their possession, and produced the responsive public records.

For the foregoing reasons, we affirm the trial court's order and hold that the trial court did not err in granting Defendants' motion to dismiss pursuant to Rule 12(b)(6).

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Affirmed.

Judge BRYANT concurs.

Judge ELMORE dissents by separate opinion.

ELMORE, Judge, dissenting.

For the reasons stated below, I respectfully dissent from the majority opinion affirming the dismissal of plaintiff's complaint for failure to state a claim pursuant to Rule 12(b)(6) of our Rules of Civil Procedure.

The Public Records Act requires state government agencies to grant reasonable access to public records when requested. "[I]t is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law." N.C. Gen. Stat. § 132-1(b) (2007). N.C. Gen. Stat. § 132-9 provides a cause of action when a government agency denies access to public records:

Any person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court shall have jurisdiction to issue such orders.

N.C. Gen. Stat. § 132-9(a) (2007).

The majority holds that, to make a valid claim under the Public Records Act, a plaintiff must plead that defendants "were in possession of . . . particular public records that were being wrongfully withheld" and that alleging that defendants "had failed to provide portions of . . . requested public records" was insufficient. Our courts have not yet specified the elements needed to make such a claim, but, based upon the plain language of § 132-9(a), it appears clear that a plaintiff must allege that (1) it sought access to public records (2) for purposes of inspection and examination and (3) was denied access to those public records. I see no statutory requirement that a plaintiff plead that the government has possession of the requested public documents. Whether the government agency has possession of the requested documents is perhaps a valid *defense* to a claim under § 132-9, but does not appear in the statute creating the cause of

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action. Moreover, the definition of “public records” does not include a “possession” requirement. Instead, whether a particular record is “public” is based in the purpose of the record’s creation. *See* N.C. Gen. Stat. § 132-1 (2007) (“‘Public record’ or ‘public records’ shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, *made or received pursuant to law or ordinance in connection with the transaction of public business* by any agency of North Carolina government or its subdivisions.”) (emphasis added). Accordingly, I believe that plaintiff adequately pled that it sought access to public records for purposes of inspection and examination and that defendants did not provide access to those public records; plaintiff’s use of the phrase “did not provide” rather than “denied access” in the complaint is inconsequential.

I also believe that the majority’s interpretation of the elements of a legitimate claim under the Public Records Act is inconsistent with our holding in *Gannett Pacific Corp. v. N.C. State Bureau of Investigation*, 164 N.C. App. 154, 595 S.E.2d 162 (2004). In *Gannett*, the plaintiff news corporation sought records of a criminal investigation conducted by the SBI by filing a request under the Public Records Act. *Id.* at 155, 595 S.E.2d at 163. The SBI completely denied Gannett’s request and Gannett brought suit under the Public Records Act. *Id.* at 159, 595 S.E.2d at 165. The SBI moved to dismiss for failure to state a claim, pursuant to Rule 12(b)(6). *Id.* at 145, 595 S.E.2d at 163. The trial court granted the motion and dismissed; Gannett appealed to this Court, which reversed and remanded. *Id.* We explained that, although Gannett was not entitled to disclosure of “the SBI’s records of its criminal investigation or criminal intelligence information,” it was “entitled to release of any other information classified as public records under the North Carolina General Statutes.” *Id.* at 155-56, 595 S.E.2d at 163. Because Gannett requested “all public records relating to the investigation of the May 3, 2002 fire at the Mitchell County, North Carolina jail,” the SBI’s categorical denial was improper because its records likely extended beyond the exempted material and included public records. *Id.* at 159, 595 S.E.2d at 165. We explained:

The burden is on the SBI to comply with Plaintiffs’ request by reviewing its records and releasing *all information* relating to the Mitchell County fire *defined as public records*. If, after reviewing its records, the SBI determines it does not have *cus-*

STATE EMPLOYEES ASS'N OF N.C., INC. v. N.C. DEPT OF STATE TREASURER

[200 N.C. App. 722 (2009)]

today of any information classified as public records, denial of Plaintiffs' request *may* be appropriate. Before this determination is made, however, dismissal of Plaintiffs' complaint is premature.

Id. (emphases added). Certainly, dismissal of a Public Records Act complaint *may be appropriate* if the government determines that it does not have custody of certain requested public records. However, dismissal is not required, especially when it appears that the requested documents are public records and exist, but have not been provided because the government deems a request to be "overly broad and complex, requiring documents from numerous sources and time periods" as defendants stated in an 18 January 2008 letter to plaintiff.

Here, plaintiff has a believable claim that defendants have improperly denied access to certain requested public records. Plaintiff appended, as an exhibit to its complaint, a 24 January 2008 letter to Sara Y. Lang, Director of Communications for the North Carolina Department of State Treasurer. In this letter, plaintiff described with specificity documents that it believed were public and had not been released by defendants:

With Ms. Lang's January 18 letter you appear to have provided most of the e-mail correspondence from representatives of Forbes to Sara Lang. However, it is clear that not all documents containing correspondence from Forbes has been provided. The January 19, 2007, 3:43 p.m. e-mail from Kai Falkenberg to Ms. Lang refers to an attached letter "a copy of which—with enclosures—has also been sent to you by fax." You have provided neither that letter nor the enclosures. Moreover, Neil Weinberg's message on the same date refers to a letter faxed to Ms. Lang from Forbes' attorney. If this is not the same letter referred to by Ms. Falkenberg, then you have not provided a copy of it.

In addition, except for some responses that are attached to the Forbes e-mails, you have not provided all responses from Ms. Lang to Forbes. For example, attached to the February 14, 2007, e-mail message from Jason Storbakken is an e-mail from Ms. Lang stating: "Please see answers inserted in your original e-mail below." However, you have not produced the e-mail that contains Ms. Lang's answers. Moreover, attached to Jason Storbakken's message of February 14, 2007, 6:16 p.m., is a message stating: "On 2/14/07 PM, 'Sara Lang' . . . wrote:" but the text of Ms. Lang's message is omitted. It is difficult for me to draw any conclusion

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except that Ms. Lang's message has been intentionally deleted from the document.

Finally, based on the size of the fee paid to the retained law firm and, thus, the number of hours that firm must have worked on this issue, it would appear that there must have been electronic or written correspondence between your office and that law firm regarding the Forbes public information request. However, no copies of any such correspondence have been produced.

The letter also reiterated that defendants had still not provided copies of the investment reports that the State Treasurer must file pursuant to N.C. Gen. Stat. § 147-69.3(h)-(i) even though those reports "are apparently from a set of reports routinely compiled and readily accessible for copying."

Accordingly, I would reverse the trial court's order dismissing plaintiff's complaint.

STATE OF NORTH CAROLINA v. JEFFERY DEVON MEWBORN

No. COA09-343

(Filed 3 November 2009)

1. Search and Seizure— motion to suppress—failure to stop or submit to police authority—flight

The trial court did not err in a prosecution for possession of a controlled substance, carrying a concealed firearm, and possession of a firearm by a convicted felon by failing to exclude evidence obtained after officers stopped defendant. Defendant's flight in conjunction with the attendant facts and circumstances supported a reasonable suspicion that defendant was engaged in some criminal activity when he was detained.

2. Firearms and Other Weapons— possession of firearm by felon—carrying concealed weapon—motion to dismiss—sufficiency of evidence—constructive possession

The trial court did not err by denying defendant's motion to dismiss the charges of possession of a firearm by a felon and carrying a concealed weapon. There was sufficient evidence for the State to proceed on a theory of constructive possession.

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[200 N.C. App. 731 (2009)]

3. Constitutional Law— effective assistance of counsel—failure to object

A defendant did not receive ineffective assistance of counsel based on his counsel's failure to object to the introduction of all evidence obtained pursuant to defendant's detention because the failure to object to admissible evidence does not constitute error.

Appeal by Defendant from judgments entered 19 August 2008 by Judge Paul L. Jones in Superior Court, Lenoir County. Heard in the Court of Appeals 16 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

S. Hannah Demeritt for Defendant-Appellant.

McGEE, Judge.

Jeffrey Devon Mewborn (Defendant) was convicted of possession of a controlled substance, carrying a concealed weapon, and possession of a firearm by a convicted felon on 19 August 2008. Defendant was sentenced to consecutive active sentences of forty-five days for carrying a concealed weapon, five to six months for possession of cocaine, and sixteen to twenty months for possession of a firearm by a felon. Defendant appeals.

Officers Williford Jones,¹ Keith Goyette, and Howard King of the Kinston Police Department were patrolling a high crime neighborhood in Kinston in a marked police car on the evening of 12 April 2006. The officers were approaching and questioning people in the neighborhood to "make sure [the people were] in the right area." Officer Goyette testified at trial that this was a common law enforcement practice. While conducting these interviews, the officers saw Defendant and an unidentified man walking in the middle of the street.

The officers approached Defendant and the man to conduct a field interview. The officers testified that Defendant and the man were not doing anything wrong and that the officers did not know Defendant prior to that evening. Rather, they approached the two men because there had been "a lot of problems in that neighborhood . . . and [they] were trying to combat the crime in that particular neighborhood that month."

1. We note that in the record transcript, Officer Jones' first name is spelled "Williford," but in the State's brief, his first name is spelled "Willifred."

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Officer Goyette testified that the officers pulled alongside the men and, through the open window of their patrol car, “asked the individuals if they would just hold up for a minute, [because they] needed to speak with [the men] for a few minutes.” Officer Jones testified that Officer Goyette “motioned to [the men] and asked them to stop.” As the officers were getting out of the police car, Defendant turned and started to run away from the car. Officers King and Jones, who had fully exited the police car, gave chase. Officer Goyette, who had not exited the police car, told the other man to wait where he was, and then Officer Goyette followed Officers King and Jones in the police car.

Defendant ran through a darkened field in a residential area and was approximately twenty to thirty feet ahead of the officers. Officer Goyette was about fifteen to twenty yards behind in the police car.

Officer Goyette testified that, as Defendant ran, he appeared to be holding his pants up at his right back pocket and was attempting to throw something out of that pocket. Officer Goyette testified that he believed there was something heavy in Defendant’s pocket and, over Defendant’s objection, testified that he believed it was a gun. Officers Jones and King testified they never saw Defendant throw anything from his pocket. Officer Goyette testified that while he never actually saw Defendant with a gun and did not actually see Defendant throw a heavy object, he did see Defendant throw a light object, which resembled paper, from his pocket.

Defendant tripped while running and the officers apprehended him. When Officer Goyette approached Defendant, Defendant’s back pocket was empty and was “hanging out.” While Defendant was on the ground and being handcuffed, Officer Goyette observed him throwing a plastic bag under the police car. Upon inspection, the bag was found to contain crack cocaine.

After handcuffing Defendant, Officers Jones and Goyette retraced the path of the chase and recovered a 9-millimeter handgun and a dollar bill. Defendant’s fingerprints were not found on the handgun and Defendant did not own the gun. The grass in the field through which the chase had passed was wet from dew. The handgun was absent of any moisture and had no dirt or leaves on it.

Defendant was charged with one count each of possession with intent to sell and deliver a controlled substance, carrying a concealed

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weapon, possession of a firearm by a convicted felon, and resisting, delaying, or obstructing a public officer. At trial, Defendant raised no objections concerning the constitutionality of the initial detention. Rather, Defendant's counsel argued that Defendant was under no duty to stop or submit to any questioning by the officers, apparently focusing on the charge of resisting a public officer.

Before the case was given to the jury, Defendant moved to dismiss all charges. The trial court denied the motion with respect to all charges, except resisting a public officer. The jury found Defendant guilty of the remaining charges: possession of a controlled substance, carrying a concealed firearm, and possession of a firearm by a convicted felon. Defendant appeals.

I. The Detention

[1] Defendant first argues that all his convictions must be reversed because the trial court failed to exclude evidence obtained after the officers unconstitutionally stopped Defendant without a reasonable suspicion that criminal activity was afoot. Defendant asserts the evidence obtained as a result of the stop was tainted by the unconstitutional nature of the stop and, therefore, the trial court committed plain error in failing to exclude the evidence. Before determining whether the trial court committed plain error, we first determine whether there was any error made at all. *State v. Torrain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, cert. denied, 479 U.S. 836, 93 L. Ed. 2d 77 (1986).

The Fourth Amendment to the United States Constitution protects a defendant from unreasonable searches and seizures. U.S. Const. Amend. IV. This protection has been made applicable to the states by the Fourteenth Amendment. *See State v. Milien*, 144 N.C. App. 335, 339, 548 S.E.2d 768, 771 (2001). To be reasonable, an arrest must generally be supported by probable cause and a warrant. *Id.* The United States Supreme Court has recognized circumstances allowing officers to briefly detain suspects for an investigatory stop where an officer has a reasonable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 30-31, 20 L. Ed. 2d 889, 911 (1968); *see also State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007), *aff'd*, 362 N.C. 244, 658 S.E.2d 643, cert. denied, — U.S. —, 172 L. Ed. 2d 198 (2008). This reasonable suspicion must be based on the attendant facts and circumstances. *Id.* In *Illinois v. Wardlow*, 528 U.S. 119, 124-25, 145 L. Ed. 2d 570, 576-77 (2000), the Supreme Court held that a suspect's unprovoked flight from police officers may prop-

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erly be considered as a factor giving rise to a reasonable suspicion to detain the suspect.

The dispositive issue in the case before us is a determination of whether Defendant was seized before or after he ran from the officers. When the officers approached Defendant and asked him to stop, they were aware only that Defendant and another man were walking together in a high crime area. If the officers seized Defendant prior to his flight, then they would have lacked grounds for detention of Defendant, rendering the subsequent detention unconstitutional. If, however, the moment of seizure did not arise until after Defendant fled, then the officers could properly have considered Defendant's flight as a factor justifying an investigatory stop.

In determining whether Defendant was seized prior to his flight, we must decide whether he submitted to the authority of the officers. *See California v. Hodari D.*, 499 U.S. 621, 626, 113 L. Ed. 2d 690, 697 (1991) ("The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not."). Defendant contends that he stopped and submitted to the officers' authority after Officer Goyette asked him to "hold up" and told him the officers "needed to speak with [him] for a minute." The State argues that Defendant neither stopped nor submitted to authority, but rather ran as soon as the officers initiated contact.

Each officer testified to a slightly different version of events at trial. Officer Goyette testified that "before [he] could even exit [his] vehicle [he] heard Officer King shout: stop, stop. And that's when [he] looked in [his] rearview mirror and the Defendant was already running." Officer Jones testified that "[the officers] got out and attempted to approach the subjects. And one of them, [Defendant], took off running." Officer King testified that "[a]s [he] was exiting the front passenger side of the vehicle, [he] noticed [Defendant] take off running very fast[.]" Officer Jones appears to be the only officer who actually exited the vehicle and began moving towards Defendant, and even his testimony is unclear regarding whether Defendant stopped and submitted to the detention. We find that a reasonable interpretation of this testimony could conclude that the officers were in various stages of exiting the vehicle and that Defendant began to run away before stopping and submitting to their authority. Therefore, his flight could properly be considered in conjunction with the attendant facts and circumstances, and we find his subsequent detention to be sup-

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ported by a reasonable suspicion that Defendant was engaged in some criminal activity.

Because Defendant suffered no violations of his Fourth Amendment rights, any evidence obtained after Defendant's stop would have been admissible whether or not defense counsel had objected at trial. Therefore, we can find no error, much less plain error, in the trial court's admission of the evidence obtained after Defendant's stop.

II. Constructive Possession

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the charges of possession of a firearm by a felon and carrying a concealed weapon. Defendant argues that the State failed to present sufficient evidence that Defendant ever possessed the handgun found by the officers. We disagree.

A trial court's ruling on a motion to dismiss is reviewed *de novo*. *State v. Davis*, — N.C. App. —, —, 678 S.E.2d 385, 388, (2009). In order to prevail on a motion to dismiss, a defendant must show that there is not "substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. McNeil*, 165 N.C. App. 777, 781, 600 S.E.2d 31, 34 (2004), *aff'd*, 359 N.C. 800, 617 S.E.2d 271 (2005) (quoting *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002)). On appeal, this Court must view the evidence "in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *Id.* (quoting *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998)).

To withstand a motion to dismiss charges of possession of a firearm by a felon or carrying a concealed weapon, the State must show that a defendant possessed or carried the weapon in question. N.C. Gen. Stat. § 14-415.1 (2007); N.C. Gen. Stat. § 14-269 (2007). Where police officers do not find the defendant in actual possession of a weapon, the State may nonetheless sustain a conviction based upon a theory of constructive possession. Constructive possession arises where a defendant is not in actual possession of an object, but has both the power and intent to control the object. *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989). Where a defendant is not in exclusive control of the place where the object is found, the State must show other incriminating circumstances to give rise to an inference of constructive possession. *Id.*

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We find a recent unpublished opinion of our Court, *State v. Little*, 179 N.C. App. 655, 635 S.E.2d 73, 2006 WL 2807185 (unpublished), to be informative on this issue. Though an unpublished opinion, the facts in *Little* are markedly similar and the legal reasoning sound. In *Little*, an officer received a call reporting the description of a suspicious person “casing” an area and found Mr. Little, who matched the description, standing beside a shed located near the area in question. *Id.* at *1. The officer stopped his patrol car approximately fifty feet away from Mr. Little and motioned for Mr. Little to approach the car. *Id.* As Mr. Little approached, the officer’s attention was diverted for five or six seconds when his microphone fell to the floor of the car. *Id.* Mr. Little was about twenty feet away when the officer next observed him. *Id.* The officer conducted a consent search of Mr. Little and asked him to wait at the patrol car while the officer searched the area where Mr. Little had been spotted. *Id.*

As the officer walked to where he had first seen Mr. Little, he observed that the grass around the area was covered with dew. *Id.* The officer’s boots got wet because of the moisture. *Id.* The officer then found a loaded gun near where he had originally discovered Mr. Little and near the area where he had lost eye-contact with him when his microphone fell. *Id.* The gun was dry. *Id.* There were no other tracks found in the area and the grass in the area had not been otherwise disturbed. *Id.* Mr. Little was charged with, and ultimately convicted of, possession of a firearm by a felon. *Id.*

At trial, Mr. Little moved to dismiss the charge of possession of a firearm by a felon, arguing that the State failed to offer sufficient evidence that he had in fact possessed the weapon. *Id.* at *5. The trial court denied Mr. Little’s motion. *Id.* Our Court found no error on these facts, observing that “[t]he State presented sufficient evidence to carry the case to the jury.” *Id.* We held “[t]he trial court properly denied [Mr. Little’s] motion to dismiss.” *Id.*

In the case before us, the evidence tended to show that Defendant ran through an open field in a high traffic area. Defendant appeared to have something heavy in his back pocket and appeared to make throwing motions from that pocket. The grass in the field was wet. When the officers found the weapon, it was dry, clean, and had no leaves or other debris on it. We note that “constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily *the questions will be for the jury.*” *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001)

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(quoting *State v. Jackson*, 103 N.C. App. 239, 243, 405 S.E.2d 354, 357 (1991), *aff'd*, 331 N.C. 113, 413 S.E.2d 798 (1992)).

Viewing the evidence in the light most favorable to the State, we hold that there was sufficient evidence presented for the State to proceed on a theory of constructive possession. Therefore, Defendant failed to show that there was not substantial evidence of each essential element of the charges against him. We therefore hold that the trial court did not err in denying Defendant's motion to dismiss the charges of possession of a firearm by a convicted felon and carrying a concealed firearm.

III. Ineffective Assistance of Counsel

[3] Defendant further argues that because his counsel failed to object to the introduction of all evidence obtained pursuant to Defendant's detention, his counsel's representation was deficient and unreasonable, and produced an unjust result, thereby denying Defendant of the effective assistance of counsel. We disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). In *Strickland*, the United States Supreme Court held that the Sixth Amendment to the United States Constitution required counsel to provide representation which meets "an objective standard of reasonableness." *Id.* at 687-88, 80 L. Ed. 2d at 693. To show that counsel's performance did not meet this standard of reasonableness, a defendant must show the following:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 80 L. Ed. 2d at 693. Our Supreme Court adopted the standard set forth in *Strickland* in 1985. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). However, in *State v. Lee*, our Supreme Court held that the failure to object to admissible evidence does not constitute an error which would satisfy the first prong of the *Strickland* test. *State v. Lee*, 348 N.C. 474, 492, 501 S.E.2d 334, 345, (1998) ("The

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first part of the *Strickland* test is not satisfied where defendant cannot even establish that an error occurred.”).

Defendant claims that he received ineffective assistance of counsel because his trial attorney failed to object to the admission of evidence obtained subsequent to Defendant’s stop. Because we have held Defendant’s stop constitutional, and the evidence thereafter obtained admissible, Defendant’s claim must fail. The failure to object to admissible evidence is not error. Thus, Defendant cannot satisfy the first element of the *Strickland* test.

Defendant has not argued his remaining assignments of error and they are therefore abandoned pursuant to N.C.R. App. P. 28(b)(6).

No error.

Judges STEELMAN and JACKSON concur.

IN THE MATTER OF: T.B.

No. COA09-575

(Filed 3 November 2009)

**Child Support, Custody, and Visitation— grandparents—
standing**

Respondent maternal grandmother’s appeal from the trial court’s adjudication and disposition orders awarding physical and legal custody of a minor child to his paternal grandparents was dismissed for lack of standing because: (1) respondent is neither a parent nor an appointed guardian of the child under N.C.G.S. § 7B-1002(4); and (2) respondent failed to demonstrate that she was the non-prevailing party since the trial court granted her requests to not award permanent custody to the paternal grandparents and grant visitation privileges to respondent.

Appeal by Respondent from orders entered 26 March 2009 by Judge Regina M. Joe in Scotland County District Court. Heard in the Court of Appeals 7 September 2009.

IN RE T.B.

[200 N.C. App. 739 (2009)]

Scotland County Department of Social Services, by Lisa D. Blalock, for Petitioner-Appellee.

Sofie W. Hosford, for Respondent-Appellant.

Pamela Newell Williams, for Guardian ad Litem.

BEASLEY, Judge.

Respondent is the minor child's maternal grandmother. She appeals from the trial court's adjudication and disposition orders awarding physical and legal custody of T.B.¹ to his paternal grandparents. Due to insufficient information in the record to determine whether Respondent has standing to pursue this appeal, we dismiss the appeal.

T.B. was born in 2003. He lived with his mother until November 2005. There are references made to a civil court proceeding where Respondent was awarded temporary custody due to T.B.'s mother's substance abuse problems, lack of stable housing, and lack of employment. No such order is provided in the record before this Court. T.B.'s father Mitchell B. has a history of substance abuse and criminal activity. During the time that T.B. lived with Respondent, T.B. regularly visited with his paternal grandmother, J. Ford, and her husband, T. Ford. Further references are made in the record that in 2007 the Fords filed a motion to intervene in the civil custody case seeking custody of T.B. Again, the record before this Court contains no such order. At some point allegations were made by Respondent that T.B. had been sexually abused by Mr. Ford, and these allegations were made known to Scotland County Department of Social Services (DSS), but the record does not reveal whether DSS or law enforcement investigated the allegations or the outcome of such investigation.

On 26 June 2008, Respondent contacted the child's guardian *ad litem* (GAL) with concerns that T.B. had regressed and was urinating on himself. Although Respondent informed the GAL that the behavior occurred after T.B. visited with the Fords, DSS investigated and found that the incidents only occurred at daycare after T.B. had been moved to a different classroom. When T.B. returned to his original classroom, the behaviors ceased. On 30 June 2008, Respondent reported that T.B. told her that Mr. Ford had put his "pee pee in [T.B.]'s mouth." DSS contacted law enforcement and conducted an

1. To protect the privacy of the minor, we refer to him in this opinion by his initials T.B.

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investigation. T.B. did not reveal any specific information about the time period or location of the alleged abuse, and in fact informed the social worker that Respondent told him to report sexual abuse by Mr. Ford. Based on its investigation, DSS was unable to determine whether Mr. Ford sexually abused T.B., and therefore could not substantiate the allegation. Similarly, law enforcement did not gather enough information for a formal charge. In a telephone call on 14 July 2008, Respondent told the social worker that she allowed T.B. to live with his mother.

On 15 July 2008, DSS filed a juvenile petition alleging neglect, stating that the child “does not receive proper care supervision, or discipline from the juvenile’s parent, guardian, custodian, or caretaker,” and that the child “lives in an environment injurious to the juvenile’s welfare.” DSS was granted non-secure custody the same day, and T.B. was placed in foster care.

T.B. was placed with the Fords on 4 August 2008. On 22 August 2008, T.B.’s mother signed an Out of Home Family Services Agreement in which she agreed to: (1) submit to a psychological evaluation and follow all recommendations; (2) complete a drug assessment and submit to random drug screens; and (3) obtain suitable housing. The permanency plan at that time was reunification.

At the adjudication hearing held on 25 September 2008, all parties stipulated to neglect in that Respondent returned T.B. to his mother without notifying or consulting DSS. The trial court adjudicated T.B. as neglected and continued the matter for disposition.

At the 29 January 2009 disposition hearing the trial court ordered T.B. to be placed with the Fords. The trial court concluded that the placement was in the best interest of the child. Additionally, the court relieved DSS of its responsibility to continue reunification efforts regarding the parents and Respondent. It appears from the record that the adjudication order was initially entered on 24 October 2008, but was signed by a judge who had not presided over the matter. The trial judge who did preside over the adjudication hearing, entered an amended adjudication order on 26 March 2009. The disposition order was initially signed and filed on 19 February 2009, but the order was amended and filed on 26 March 2009 by the trial court to correct “material errors and omissions.” From the amended orders, Respondent appeals.

We first address the issue of whether Respondent has standing to bring this appeal. Both Petitioner and the GAL argue that Respondent

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has no standing to pursue an appeal of the court's orders because she is neither a parent, a guardian, or a custodian pursuant to N.C. Gen. Stat. § 7B-1002(4) (2007). Although Respondent's brief does not address the issue of standing, we are compelled to address this issue. "Standing is jurisdictional in nature and "[c]onsequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved." ' ' *In re T.M.*, 182 N.C. App. 566, 570, 643 S.E.2d 471, 474 (quoting *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004)), *aff'd*, 361 N.C. 683, 651 S.E.2d 884 (2007). "As the party invoking jurisdiction, plaintiff [] ha[s] the burden of proving the elements of standing." *Neuse River Found. v. Smithfield Foods*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 364 (1992)).

An appeal may be taken from an order of disposition following an adjudication of neglect, abuse, or dependency. N.C. Gen. Stat. § 7B-1001(3) (2007). Only certain parties may pursue such an appeal. Under N.C. Gen. Stat. § 7B-1002 (4), a parent, appointed guardian, or custodian who is a non-prevailing party may bring an appeal. Generally, the party invoking jurisdiction has the burden of proving she has standing to pursue their claims. *See Neuse River Found.*, 155 N.C. App. at 113, 574 S.E.2d at 51 (citation omitted). In the case *sub judice*, Respondent, T.B.'s maternal grandmother, is neither a parent nor an appointed guardian for purposes of this statute.

N.C. Gen. Stat. § 7B-101(8) (2007) defines "custodian" as "[t]he person or agency that has been awarded legal custody of a juvenile by a court or a person, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court." There are places in the record where references are made of a prior civil court proceeding where Respondent was awarded temporary custody of T.B. in 2005. In the "Amended Order on Adjudication", finding of fact number 6 states, in part that:

[p]ursuant to G.S. § 7B-902. The parties have agreed to enter into a consent judgment. With respect to the Respondent father, the Court received the testimony of Wendy Stanton. The parties have agreed and the Court finds that the juvenile is a neglected juvenile in that the juvenile does not receive proper care or supervision from [him] parent or custodian, and lives in an environment injurious to the juvenile's welfare, to wit:

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Scotland County Department of Social Services received a report on June 23, 2008, that the juvenile had regressed and was using the bathroom on himself (urinating and defecating) while at day-care. *The maternal grandmother has temporary custody of the juvenile due to an extensive history of the respondent mother's substance abuse and drug history, lack of stable housing, and lack of employment.* The respondent father has [sic] history of substance abuse, a lengthy criminal record, and a strained relationship with the juvenile at this time. Upon investigation, the social worker found that the regression of the bathroom behavior was only at daycare. The daycare provider moved the juvenile back into his old classroom with which he was familiar and his regressions ceased. (emphasis added).

A North Carolina Guardian Ad Litem Court Report dated 29 January 2009 states:

This GAL has been involved with T.[B.] since May of this year, when she was appointed as Guardian ad Litem in a Civil [sic] custody case involving [G.] Faulk (maternal grandmother) [sic] and [J.] and [T.] Ford (paternal grandmother and step-grandfather). *Maternal Grandmother, [G. Faulk], has had temporary custody of T.[B.] since 12/12/05 due to an extensive history of unstable housing and substance abuse on the part of T.[B.'s] mother, . . . (Ms. Faulk's daughter). . . . Mr. and Mrs. Ford filed a Motion to Intervene in the custody action regarding T.[B.] on 8/20/07 and an order was entered on 9/10/07 allowing them to do so. A Motion in the Cause was filed on 9/13/07 by the Ford's requesting custody of T.B. be placed with them. Since that time, the grandparents have been in a custody battle in Civil Court. . . .*" (emphasis added).

There are several other references to a custody action commenced by Respondent in civil court, all of which are made either by testimony of a GAL volunteer, argument by the attorney for paternal grandmother, J. Ford, or argument by Petitioner. Respondent however has not provided a copy of an order awarding custody, either legal or physical, of T.B. to her. Our Court is not able to establish whether custody of T.B. was awarded to Respondent, the means and circumstances by which custody might have been awarded to Respondent, nor the time period and the duration of any custody order. Further, there is no order nor any inferences that any award of custody of T.B. to Respondent which might have been entered in 2005 or remained in effect in 2008.

IN RE T.B.

[200 N.C. App. 739 (2009)]

Because there is no evidence that Respondent was awarded legal custody, we must determine whether Respondent acted as custodian by “assum[ing] the status and obligation of a parent without being awarded the legal custody of a juvenile by a court.” N.C. Gen. Stat. § 7B-101(8).

Such a determination involves deciding whether a person has acted *in loco parentis* to the child in question. See *In re A.P.*, 165 N.C. App. 841, 843, 600 S.E.2d 9, 11 (2004). As this Court has stated:

A person does not stand *in loco parentis* “from the mere placing of a child in the temporary care of other persons by a parent or guardian of such child. This relationship is established only when the person with whom the child is placed intends to assume the status of a parent—by taking on the obligations incidental to the parental relationship, particularly that of support and maintenance.”

Liner v. Brown, 117 N.C. App. 44, 49, 449 S.E.2d 905, 907 (1994) (quoting *State v. Pittard*, 45 N.C. App. 701, 703, 263 S.E.2d 809, 811 (1980)).

In *In re A.P.*, this Court held that the Respondent paternal step-grandfather was not an appropriate party to appeal from a permanency planning order. Several factors were noted: (1) the fact that the step-grandfather’s name was listed on the juvenile petition as a parent, guardian, custodian, or caretaker was not dispositive; (2) the child’s parents remained involved or were attempting to remain involved in the child’s life, meaning that the placement with the step-grandfather was considered temporary; (3) the child was placed with the step-grandfather for only one month before the child’s parents signed case plans with DSS, and the child only spent a total of eight months in the Respondent’s care; (4) although the Respondent signed a kinship agreement several months after assuming care of the child, temporary custody remained with DSS; and (5) the step-grandfather was not explicitly made a party to any custody action beyond being listed on the juvenile petition. Despite the fact that this Court in *In re A.P.* acknowledged that the Respondent was a caretaker, and in fact the primary caretaker, of the child, this Court determined that the temporary nature of the care meant that the Respondent did not act *in loco parentis* to the child. The appeal was dismissed for lack of standing. *In re A.P.*, 165 N.C. App. at 843-47, 600 S.E.2d at 11-13.

In the instant case, DSS and the GAL argue that Respondent’s unauthorized decision to return T.B. to his mother demonstrates her

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[200 N.C. App. 739 (2009)]

lack of intent to assume the status and obligation of a parent. They further argue that T.B. was out of Respondent's care for at least six months while these proceedings advanced, and that Respondent failed to attend the disposition hearing. Petitioner contends these facts show that Respondent was merely a caretaker and not interested in assuming a parental role for T.B. After careful review, we conclude that the record is insufficient to establish whether Respondent was a custodian such that she has standing to pursue this appeal.

There is little information provided regarding the extent of and the periods that Respondent provided care for T.B. It appears that T.B. may have lived with Respondent from some time in 2005 for an unknown duration, and that Respondent had at least some responsibility for the child. T.B. also spent a great deal of time with his paternal grandparents, the Fords. The GAL report dated 29 January 2009 stated that the Fords "shared parenting responsibility" with Respondent. GAL Jean Barbour testified at the disposition hearing that T.B. "lived with [Respondent] and with the Fords," and that "[t]hey shared in the caretaking of him." When asked whether Respondent was T.B.'s primary caretaker and whether T.B. resided principally with Respondent, Barbour responded, "[w]ell, I don't know the answer to that. He resided with both of them. They shared caretaking responsibility of him." There is no evidence of Respondent's level of support and maintenance in caring for T.B., or whether it was Respondent or the Fords who took T.B. to medical appointments or provided for other needs, etc.

Unlike *In re A.B.*, there is no evidence about any involvement that either of T.B.'s parents might have had with T.B. during the period he lived with Respondent. T.B.'s mother did not sign a case plan until after T.B. was removed from Respondent's care in the autumn of 2008. It is also unclear the level of involvement by DSS during the time T.B. lived with Respondent and whether any steps were taken to attempt to reunify T.B. with either of his parents. We conclude that there is no evidence that would clarify whether T.B.'s living arrangement with Respondent was intended to be temporary or permanent or its duration.

In *In re A.P.*, this Court determined that the step-grandfather was merely a caretaker and not a custodian of the minor child. *Id.* at 846, 600 S.E.2d at 12. In the case *sub judice*, it appears that Respondent's care and supervision of T.B. was more involved than that of the Respondent in *In re A.P.* However, Respondent has failed to demon-

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strate to this Court that she had been awarded legal custody of T.B., that she was his custodian, and the duration of either status. Therefore, given the absence of court orders establishing Respondent's legal status with respect to T.B., and the lack of evidence presented as to Respondent's level of care and support of T.B. or of the participation of T.B.'s parents and DSS in T.B.'s life, and Respondent's return of T.B. to his mother, we are unable to conclude that Respondent's actions are consistent with one who assumes the status and obligation of a parent such that she was a "custodian" for purposes of N.C. Gen. Stat. § 7B-1002(4).

Respondent has also failed to demonstrate that she is the non-prevailing party. N.C. Gen. Stat. § 7B-1002(4) further states that to have standing, either a parent, guardian or custodian must be the "nonprevailing party." "A prevailing party is defined as one in whose favor the decision or verdict is rendered and judgment entered[.]" *House v. Hillhaven, Inc.*, 105 N.C. App. 191, 195, 412 S.E.2d 893, 896 (1992) (internal quotations omitted). Respondent stipulated to the trial court's finding of neglect. Respondent did not at the disposition hearings request that the trial court place custody of T.B. with her. In fact, Respondent did not appear at the disposition hearing. Respondent's counsel, in Respondent's absence, argued that T.B.'s paternal grandparents, the Fords, should not be awarded permanent custody and Respondent's counsel requested visitation on behalf of Respondent. Respondent's counsel argued:

Your Honor, we ask that you not award legal physical [sic] [custody] to the Fords on a permanent basis, that you keep this case open, and that [Respondent] be allowed to visit with her grandchild.

The trial court did not award permanent custody to the Ford's and the trial court granted visitation privileges to Respondent. Because the trial court granted the Respondent's requests, she has failed to articulate that she is a non-prevailing party.

We conclude that Respondent has failed to meet her burden demonstrating that she has standing to pursue this appeal as a custodian of the child and that she was the non-prevailing party. Accordingly, we dismiss the appeal.

Appeal dismissed.

Judges GEER and HUNTER, JR. concur.

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[200 N.C. App. 747 (2009)]

THE ESTATE OF KENNETH L. WILSON AND DORIS WILSON, IN HER CAPACITY AS THE ADMINISTRATRIX OF THE ESTATE OF KENNETH L. WILSON, PETITIONERS
v. DIVISION OF SOCIAL SERVICES AND DIVISION OF MEDICAL ASSISTANCE OF
THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,
RESPONDENTS

No. COA09-216

(Filed 3 November 2009)

Public Assistance— Medicaid—eligibility—purchase agreement—chattel—countable resource

The trial court erred by concluding that a purchase agreement was “chattel” and a countable resource for purposes of determining decedent’s eligibility for Medicaid. The case is remanded to the superior court for further remand to the Department of Health and Human Services for further proceedings to determine whether petitioner is entitled to Medicaid assistance without the purchase agreement included in the calculation.

Appeal by petitioners from judgment and order entered 14 November 2008 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 September 2009.

Ott Cone & Redpath, P.A., by Laurie S. Truesdell, for petitioner appellants.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for North Carolina Department of Health and Human Services respondent appellee.

HUNTER, JR., Robert N., Judge.

Petitioner Doris Wilson, in her capacity as the administratrix of the Estate of Kenneth L. Wilson, appeals from the superior court’s decision which reversed respondent North Carolina Department of Health and Human Services’ (“DHHS”) final decision, but nonetheless held that Kenneth L. Wilson’s assets exceeded the \$3,000.00 resource limit for Medicaid eligibility. We disagree, and accordingly reverse the superior court’s decision and remand to the superior court for further remand to DHHS for further proceedings in accordance with this opinion.

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[200 N.C. App. 747 (2009)]

I. Factual Background

Kenneth L. Wilson (“Mr. Wilson”) was hospitalized at Carolinas Medical Center on 7 January 2007 until his death on 22 February 2007. During Mr. Wilson’s hospitalization, his wife, Doris Wilson, sold her 100% stock ownership in Brothers Delivery Service, Inc. (“Brothers”) to her son, Kenneth L. Wilson, Jr., via a purchase agreement dated 24 January 2007 (“Purchase Agreement”). Pursuant to the Purchase Agreement, Kenneth L. Wilson, Jr., agreed to purchase 100% of the stock and assets associated with Brothers for the price of \$62,531.00, to be paid in sixty installments of \$1,041.82 each, beginning on 1 March 2007. The Purchase Agreement was signed by Kenneth Wilson, Jr., but was not signed by Doris Wilson.

On 5 April 2007, Doris Wilson applied for Medicaid benefits seeking coverage for Mr. Wilson’s hospitalization. The Mecklenburg County Department of Social Services (“DSS”) denied petitioner’s application for Medicaid benefits on 5 July 2007. This decision was affirmed by DSS in a Local Hearing Decision dated 3 August 2007, which found that the Purchase Agreement was a promissory note, the value of which counted toward Mr. Wilson’s assets for the purpose of determining his eligibility for Medicaid benefits. Mr. Wilson’s countable assets totaled \$8,375.98 after the minimum Community Spouse Resource Allowance of \$20,328.00 was subtracted from his total assets of \$28,703.93. The total assets were calculated based on Mr. Wilson’s available resources, including two account balances in two Branch Banking and Trust Accounts, a First Citizens bank account, and the value of a promissory note. DSS found that the value of Mr. Wilson’s assets exceeded Medicaid’s allowable resource limit of \$3,000.00 and disqualified Mr. Wilson for Medicaid benefits. DSS’s decision was affirmed by DHHS in a State Hearing Decision issued 3 October 2007; DHHS upheld the classification of the Purchase Agreement as a saleable promissory note. Petitioner requested further review of DHHS’s decision alleging the Purchase Agreement was a bill of sale and not an asset for purposes of qualification for Medicaid benefits. On 22 January 2008, the DHHS Chief Hearing Officer issued a final decision affirming the 3 October 2007 decision denying Mr. Wilson’s Medicaid benefit application due to excess resources.

Petitioner sought judicial review of DHHS’s final decision in Mecklenburg County Superior Court. In an Order dated 14 November 2008, the trial court reversed DHHS’s final decision, finding the Purchase Agreement was not a saleable promissory note, but was an

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agreement for the sale of stock, a “chattel” with a value of \$62,531.00. The trial court concluded, however, that the Purchase Agreement was countable against Mr. Wilson’s assets for determining his eligibility for Medicaid benefits. The trial court remanded the issue to the Chief Hearing Officer to enter a new decision consistent with the trial court’s findings. From this order, petitioner appeals.

II. Standard of Review

The North Carolina Administrative Procedure Act provides an aggrieved party with the right to judicial review of an agency’s final decision in a contested case. N.C. Gen. Stat. § 150B-43 (2007). Where a petitioner asserts that an agency’s decision was affected by legal error, this Court reviews the agency’s decision *de novo*. See *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citing *Sutton v. N.C. Dep’t of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)).

[W]hen an appellate court reviews

“a superior court order regarding an agency decision, ‘the appellate court examines the trial court’s order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.’ ”

Id. at 14, 565 S.E.2d at 18 (quoting *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)). Accordingly, this Court must determine whether the superior court properly applied the correct standard of review to the undisputed facts of the case at bar.

III. Issues on Appeal

On appeal, petitioner contends that (1) the trial court erred in concluding that the Purchase Agreement is “chattel,” a countable resource for purposes of determining Mr. Wilson’s eligibility for Medicaid, or (2) in the alternative, if the Purchase Agreement is a countable resource, Brothers is excluded as a countable resource for the time period prior to Doris Wilson’s making and attempted execution of the agreement pursuant to the North Carolina Adult Medicaid Manual as property actively involved in trade or business. We agree with petitioner and conclude that the Purchase Agreement is not a countable resource.

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First, petitioner contends that the Purchase Agreement is a bill of sale, not a negotiable instrument, and as such, should not be counted as a resource for purposes of determining Medicaid eligibility. While we do not agree with petitioner's characterization of the Purchase Agreement as a bill of sale, we do agree that the agreement is not a countable asset for Medicaid eligibility purposes.

Pursuant to Title XIX of the Social Security Act, the Medicaid program " 'provid[es] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons.' " *Schweiker v. Gray Panthers*, 453 U.S. 34, 36, 69 L. Ed. 2d 460, 465 (1981) (quoting *Harris v. McRae*, 448 U.S. 297, 301, 65 L. Ed. 2d 784, 794, *reh'g denied*, 448 U.S. 917, 65 L. Ed. 2d 1180 (1980)). Each state establishes its own criteria for assessing Medicaid eligibility; therefore, "[a]n individual is entitled to Medicaid if he fulfills the criteria established by the [s]tate in which he lives." *Id.* at 36-37, 69 L. Ed. 2d at 465. N.C. Gen. Stat. § 108A-55(a) (2007) provides the following:

[DHHS] may authorize, within appropriations made for this purpose, payments of all or part of the cost of medical and other remedial care for any eligible person when it is essential to the health and welfare of such person that such care be provided, and when the total resources of such person are not sufficient to provide the necessary care.

DHHS developed the North Carolina Adult Medicaid Manual ("NCAMM") to determine whether or not an applicant is eligible to receive Medicaid coverage.

According to the NCAMM, DHHS considers three types of property when determining eligibility: (1) real property, (2) personal property, and (3) liquid assets. North Carolina Adult Medicaid Manual § 2230I.B.1-3 (2008); *see also* 20 C.F.R. § 416.1201 (2009). The manual defines real property as "land and all buildings or dwellings which are permanently affixed to the land." *Id.* Personal property is defined as "all personal effects and household goods[.]" *Id.* "Liquid assets include cash, bank accounts, certificates of deposit as well as any item that can be converted to cash[.]" *Id.*

In the present case, the resource at issue is the Purchase Agreement purporting to sell 100% of Doris Wilson's stock and other assets of Brothers to Kenneth Wilson, Jr. With regard to the characterization of the Purchase Agreement, the Court notes that the parties agree that the agreement cannot be classified as either real or personal property. Therefore, in order to be considered a countable resource

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for determining Medicaid eligibility, the Purchase Agreement must meet the aforementioned definition of a liquid asset.

DHHS, in its final decision, concluded that the Purchase Agreement was a promissory note, a negotiable instrument and countable resource for determining Medicaid eligibility. In order to be classified as a negotiable instrument, a writing must meet the following criteria:

[B]e signed by the maker or drawer, contain an unconditional promise or order to pay a sum certain in money, contain no other promise, order, obligation or power given by the maker or drawer except as authorized by G.S. Chapter 25, Article 3, be payable on demand or at a definite time, and be payable to order or to bearer.

Gillespie v. DeWitt, 53 N.C. App. 252, 256-57, 280 S.E.2d 736, 740 (1981), *cert. denied*, 304 N.C. 390, 285 S.E.2d 832 (1981). On appeal, petitioner contends, and DHHS agrees in its brief, that the Purchase Agreement is not a negotiable promissory note because the payment terms were too uncertain to constitute an unconditional promise to pay. The superior court agreed and reversed DHHS's determination that the Purchase Agreement was a promissory note, but held that the agreement is "chattel," a countable resource for determining Medicaid eligibility, having a value of \$62,531.00 to Doris Wilson.

With regard to this issue, we agree that the Purchase Agreement is not a promissory note; however, we disagree with the superior court's determination that the Purchase Agreement is "chattel." Chattel is defined as "movable or transferable property." *Black's Law Dictionary* 95 (2d ed. 2001). Moreover, chattel paper is defined as "[a] writing that shows both a monetary obligation and a security interest in or a lease of specific goods." *Id.* The Purchase Agreement is neither transferrable nor movable. In addition, in order to be characterized as chattel paper, the resource must show a monetary obligation and thus be capable of being monetarily valued. *See id.* Here, as agreed upon by the parties in their briefs, the payment terms of the Purchase Agreement were too uncertain to determine what value should be given and when payments of such value should begin. Accordingly, the superior court erred in characterizing the agreement as chattel or chattel paper.

With regard to Mr. Wilson's Medicaid eligibility, this Court recognizes that the purpose of the Purchase Agreement was to sell Doris Wilson's family business, Brothers, to her son, Kenneth Wilson,

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Jr. DHHS argues that the ultimate issue in this matter rests on a determination of the present ownership status of Brothers. More specifically, DHHS contends that the Purchase Agreement did not transfer Doris Wilson's interest in Brothers to Kenneth Wilson, Jr., because the agreement was not signed by both parties. Therefore, DHHS contends that Doris Wilson currently maintains her ownership interest in Brothers.

In response, petitioner avers that DHHS did not raise the issue of Brothers' ownership status or the validity of the Purchase Agreement at the administrative agency level or the trial court level. Although the Court notes that the Purchase Agreement was not signed by Doris Wilson, after a careful review of the record on appeal, it appears that DHHS did not preserve the issues of Brothers' ownership status or the validity of the Purchase Agreement for appeal; therefore, pursuant to Rule 10 of the Rules of Appellate Procedure, the issues are not properly before this Court. *See* N.C. R. App. P. 10(b)(1); *see also Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 159-60, 394 S.E.2d 698, 700 (1990) (holding that "[a] contention not raised in the trial court may not be raised for the first time on appeal"). Even if DHHS had preserved the issues for appeal, DHHS's argument is self-defeating. For instance, if the Court accepts DHHS's argument as true, Doris Wilson's interest in Brothers' stock and assets would be excluded as a countable asset for Medicaid eligibility purposes pursuant to DHHS's NCAMM. In pertinent part, the NCAMM provides that property actively used in a business or trade is excluded as a resource in determining Medicaid eligibility. North Carolina Adult Medicaid Manual § 2230VIA.5 (2008). Prior to Doris's and Kenneth Wilson Jr.'s drafting and execution of the Purchase Agreement, Doris Wilson's stock and assets of Brothers would have been characterized as property actively involved in a trade or business, Brothers. Further, during DHHS's administrative agency hearing, the Mecklenburg County income caseworker noted that Brothers was being classified as a non-countable asset prior to Doris Wilson's transfer of the stock and assets of the business via the Purchase Agreement. Therefore, prior to the Purchase Agreement, Doris Wilson's ownership interest in the stock as Mr. Wilson's spouse would have been excluded by DHHS pursuant to the definitions in the Medicaid Manual.

The stock and asset transfer via the Purchase Agreement should not affect Mr. Wilson's Medicaid eligibility because his eligibility would not have been adversely affected by Doris Wilson's maintain-

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ing her ownership of the stock and all assets in Brothers. The purpose of Medicaid, pursuant to Title XIX of the Social Security Act, as stated above, is “ ‘to reimburse certain costs of medical treatment for needy persons.’ ” *Schweiker*, 453 U.S. at 36, 69 L. Ed. 2d at 465 (quoting *Harris*, 448 U.S. at 301, 65 L. Ed. 2d at 794). If Doris Wilson had not executed the Purchase Agreement to sell her interest in Brothers to her son, Mr. Wilson may be considered a “needy person” pursuant to Title XIX and the DHHS guidelines, and he would be eligible for Medicaid coverage.

IV. Conclusion

In accordance with the purpose of Title XIX of the Social Security Act and the NCAMM, we conclude that this Purchase Agreement is not a liquid asset for the purpose of determining Mr. Wilson’s Medicaid eligibility. The agreement does not fit squarely within any of the three aforementioned categories of countable assets; therefore, it should be excluded from the calculation. Our Supreme Court has provided that “ ‘[t]he role of the Court is not to sit as a super legislature and second-guess the balance struck by elected officials’ ”; therefore, this Court should defer in this matter to the policy adopted by the United States Congress. *Diaz v. Division of Soc. Servs.*, 360 N.C. 384, 389, 628 S.E.2d 1, 5 (2006) (quoting *State v. Bryant*, 359 N.C. 554, 565, 614 S.E.2d 479, 486 (2005)). We hold that the trial court, in determining that the Purchase Agreement is chattel, acted under a misapprehension of law and thereby applied an incorrect standard of review to the undisputed facts. The decision of the superior court is reversed, and we remand to the superior court for further remand to DHHS for further proceedings to determine whether petitioner is entitled to Medicaid assistance if the Purchase Agreement is not included in the calculation.

Reversed and remanded.

Judges STEPHENS and BEASLEY concur.

EDWARDS v. GE LIGHTING SYS., INC.

[200 N.C. App. 754 (2009)]

TAMMY C. EDWARDS, ADMINISTRATRIX OF THE ESTATE OF PAUL ROGER EDWARDS, PLAINTIFF-APPELLANT v. GE LIGHTING SYSTEMS, INC. AND GENERAL ELECTRIC COMPANY, DEFENDANTS-APPELLEES

No. COA09-247

(Filed 3 November 2009)

Wrongful Death— workplace safety—no showing company voluntarily undertook independent obligation to monitor safety

The trial court did not err in a wrongful death case by granting summary judgment in favor of defendant GE because there were no allegations of any specific undertaking by GE that would create a genuine issue of material fact that GE went beyond concern or minimal contact about safety matters and assumed the primary responsibility for workplace safety at a GE subsidiary.

Appeal by plaintiff from order entered 10 December 2007 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 29 September 2009.

Michaels & Michaels, P.A., by John A. Michaels, and Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Allan R. Tarleton, for plaintiff-appellant.

Smith Moore Leatherwood, L.L.P., by Jonathan A. Berkelhammer, Jeri L. Whitfield and Lisa K. Shortt, for defendant-appellee General Electric Company.

CALABRIA, Judge.

Tammy C. Edwards, administratrix of the estate of Paul Roger Edwards, (“plaintiff”) appeals from an order granting General Electric Company’s (“G.E.”) motion for summary judgment. We affirm.

I. Background

Paul Roger Edwards (“Edwards”) was an employee of G.E. Lighting Systems, Inc. (“GELS”), a subsidiary of G.E.¹ GELS manufactures industrial lights utilizing a process which requires baking metal parts in annealing ovens with an oxygen-free gas which contains a high concentration of carbon monoxide. The annealing process is classified by G.E. as a “High Risk Operation.”

1. GELS and G.E. will henceforth be referred to collectively as “defendants.”

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GELS has its own environmental health and safety department (“EHS”), which is comprised of an EHS manager and safety team leader, both of whom are further supported by safety teams comprised of plant workers throughout all areas of the GELS facility. EHS operates under a three-tier audit program, consisting of (1) comprehensive compliance self-assessments by the plant; (2) a biannual verification audit conducted by G.E. or another third-party auditor; and (3) global operating reviews. G.E. personnel conducted verification audits in 2001 and 2003. The purpose of these verification audits is to ensure that the self-assessment programs were being properly utilized by G.E.’s subsidiaries.

G.E. was able to monitor the GELS facility through web based safety audit systems. The PowerSuite system (“PowerSuite”) is a self-assessment tool comprised of over one hundred “modules” designed to ensure federal regulatory compliance. GELS’ EHS employees conduct PowerSuite self-assessments at least once per year using modules selected by G.E. G.E.’s auditors use the results of the PowerSuite self-assessments when they conduct their biannual verification audits. Any deficiencies noted during a PowerSuite self-assessment can be placed in a web based audit tracking system.

The Health & Safety Framework (“HSF”) is a subsidiary self-assessment tool used by GELS to ensure that it has management systems in place that will ensure good health and safety programs. HSF helps EHS employees determine whether effective managerial systems are in place in twenty-one general subject areas, including high risk operations. As with PowerSuite, deficiencies discovered during HSF self-assessments may be placed in a web based audit tracking system. On the last HSF self-assessment conducted by GELS before Edwards’ death, the GELS plant received a score of 17.89 out of 20 possible points.

Select G.E. safety personnel can access the status of any deficiencies posted in the web based audit tracking system, but ultimately GELS’ employees are responsible for implementing corrections and closing out outstanding deficiencies in the audit tracking system. G.E.’s review is typically limited to tracking whether deficiencies inputted in the system are corrected within a specified time frame.

In December 2003, Edwards was employed by GELS as an annealing oven operator in GELS’ manufacturing plant located in Hendersonville, North Carolina. On 4 December 2003, while taking a

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break behind one of the annealing ovens, Edwards died from carbon monoxide poisoning. An investigation by the North Carolina Department of Labor, Division of Occupational Safety and Health (“NCOSHA”) following the accident revealed that equipment involved with the annealing ovens leaked carbon monoxide, which caused Edwards’ death. GELS was cited by NCOSHA for a number of “serious” safety violations, but had never been previously cited for NCOSHA violations related to carbon monoxide levels at the plant prior to the death of Edwards.

On 1 September 2005, plaintiff filed a wrongful death action against defendants in Henderson County Superior Court, seeking compensatory and punitive damages. The complaint alleged the following as willful and wanton conduct on the part of defendants: (1) failure to have certain safety precautions and carbon monoxide monitors in place; (2) failure to properly train personnel in the use of the equipment and detection of safety hazards related to the equipment; (3) failure to follow generally accepted safety and maintenance recommendations; and (4) failure to provide effective ventilation.

On 18 May 2007, defendants filed a motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 (2007). On 10 December 2007, the trial court entered an order that granted G.E.’s motion for summary judgment.² Plaintiff appeals.

II. Standard of Review

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007).

The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.

A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff’s case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount

2. GELS’ motion for summary judgment was denied by the trial court, but that denial was reversed by this Court in *Edwards v. GE Lighting Sys.*, — N.C. App. —, 668 S.E.2d 114 (2008). Therefore, GELS is not a party to this appeal.

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an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.

Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.

Spaulding v. Honeywell Int'l, Inc., 184 N.C. App. 317, 320, 646 S.E.2d 645, 648 (2007) (citation omitted), *disc. rev. denied*, 361 N.C. 696, 654 S.E.2d 482 (2007). We review an order allowing summary judgment *de novo*. *Id.* at 321, 646 S.E.2d at 648.

III. Analysis

Plaintiff argues that the trial court erred by granting summary judgment to G.E. because G.E. voluntarily undertook an independent obligation to monitor safety at the GELS plant and then negligently performed that obligation. We disagree.

A. *Hamby v. Profile Prods., L.L.C.*

It must first be noted that defendants argue they are entitled to immunity under the Workers' Compensation Act via the holding of *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 652 S.E.2d 231 (2007). *Hamby* involved a parent who was also the sole member-manager of its subsidiary limited liability company ("LLC"). *Id.* at 633, 652 S.E.2d at 233. Our Supreme Court conducted a detailed analysis of the role of a member-manager of an LLC and determined that an entity in that role, under Delaware law, was necessarily "conducting the business" of the LLC, and therefore entitled to immunity under the Workers' Compensation Act. *Id.* at 639, 652 S.E.2d at 237. Additionally, the parent in *Hamby* was responsible for all aspects of the subsidiary's business and its involvement with the subsidiary was not limited to involvement with safety. *Id.* at 638, 652 S.E.2d at 236.

In the instant case, GELS is not an LLC and G.E. is not a member-manager. G.E.'s involvement with GELS is not nearly as extensive as the parent in *Hamby*. The holding in *Hamby* specifically depended upon where the parent company as member-manager fit into the framework of an LLC under Delaware law. The detailed factual analysis conducted by the *Hamby* Court does not support the broad holding of *per se* parent company immunity encouraged by defendants.

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There is nothing in *Hamby* that could be read to create *per se* immunity for a parent corporation under the Workers' Compensation Act.

B. The Good Samaritan Doctrine

"In North Carolina, *the employer* owes a non-delegable duty to provide a safe workplace to its employees." *Spaulding*, 184 N.C. App. at 323, 646 S.E.2d at 650. *See also* N.C. Gen. Stat. § 95-129 (1) & (2) (2007). In the instant case, it is undisputed that Edwards was employed by GELS at the time of his death. As an employer, GELS owed a non-delegable duty to provide Edwards with a safe workplace. G.E. was not Edwards' employer and therefore owed him no statutory duty. However, this fact does not end our analysis of G.E.'s potential liability.

This Court has held, "under certain circumstances, one who undertakes to render services to another which he should recognize as necessary for the protection of a third person, or his property, is subject to liability to the third person, for injuries resulting from his failure to exercise reasonable care in such undertaking." *Condominium Assoc. v. Scholz Co.*, 47 N.C. App. 518, 522, 268 S.E.2d 12, 15 (1980) (citations omitted). This holding relies upon the Restatement (Second) of Torts § 324A, also known as the "Good Samaritan" doctrine, which states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect³ (sic) his undertaking, if

- (1) his failure to exercise reasonable care increases the risk of such harm, or
- (2) he has undertaken to perform a duty owed by the other to the third person, or
- (3) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A (1965). The threshold question in a Good Samaritan claim is whether G.E. undertook affirmative steps to ensure the safety of GELS employees, creating an inde-

3. The word "protect" is apparently a typographical error and was intended to be "perform." *See Hill v. United States Fidelity & Guaranty Co.*, 428 F.2d 112, 115 n.2 (5th Cir. 1970).

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pendent duty of care to plaintiff. *Richmond v. Indalex Inc.*, 308 F.Supp.2d 648, 661 (M.D.N.C. 2004).

In *Richmond*, the United States District Court for the Middle District of North Carolina considered the question of whether a parent should be liable for the workplace safety of the employees of its subsidiary under the Good Samaritan doctrine. This Court, in *Spaulding*, adopted the following portion of the *Richmond* opinion, which itself relied upon *Muniz v. National Can Corp.*, 737 F.2d 145, 148 (1st Cir. 1984), to establish a framework for determining whether a parent company undertook affirmative steps to ensure the safety of a subsidiary:

An employer has a nondelegable duty to provide for the safety of its employees in the work environment. The parent-shareholder is not responsible for the working conditions of its subsidiary's employees merely on the basis of [the] parent-subsidiary relationship. *A parent corporation may be liable for unsafe conditions at a subsidiary only if it assumes a duty to act by affirmatively undertaking to provide a safe working environment at the subsidiary. Such an undertaking may be express, as by contract between the parent and the subsidiary, or it may be implicit in the conduct of the parent . . .*

Because *an employer* has a nondelegable duty to provide safe working conditions for its employees, *we do not lightly assume that a parent corporation has agreed to accept this responsibility.* Neither mere concern with nor minimal contact about safety matters creates a duty to ensure a safe working environment for the employees of a subsidiary corporation. To establish such a duty, the subsidiary's employee must show some proof of a positive undertaking by the parent corporation.

Spaulding, 184 N.C. App. at 323-24, 646 S.E.2d at 650 (quoting *Richmond*, 308 F.Supp.2d at 662-63). Therefore, in order to overcome summary judgment, plaintiff had the burden of forecasting evidence that G.E. affirmatively undertook to provide a safe working environment at GELS, beyond concern or minimal contact about safety matters. The *Muniz* Court characterized this question as "whether [the] parent corporation [has] assumed primary responsibility for industrial safety at [the] subsidiary corporation's plant." 737 F.2d at 146.

Muniz and the courts that have subsequently followed its framework have typically rejected claims of parent liability in this context. In *Muniz*, the parent corporation provided general safety guidelines

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to be implemented by local management, which the First Circuit Court of Appeals found amounted to only a mere concern with safety matters. 737 F.2d at 149. In *Spaulding*, this Court held that the parent-member of an LLC did not undertake any affirmative duty to provide a safe workplace for the LLC's employees by entering into an operating agreement for the LLC's plant with other members of the LLC. 84 N.C. App. at 326, 646 S.E.2d at 651. In *Richmond*, the Court held that allegations that the parent company was concerned about safety at the subsidiary and that the parent company promulgated safety procedures that the subsidiary was supposed to implement were insufficient as a matter of law to create an independent claim of negligence against the parent. 308 F.Supp.2d at 663. *See also Bujol v. Entergy Servs., Inc.*, 922 So.2d 1113 (La. 2004) (a parent company providing a technical instruction document to its subsidiaries did not supplant the subsidiary's duty to provide its employees with a reasonable, safe place to work with regard to the specific items referenced in the document); *but see Merrill v. Arch Coal, Inc.*, 118 F.App'x 37 (6th Cir. 2004) (holding that under the *Muniz* standard, a corporation's safety program, safety awards, and general safety guidelines were insufficient to create a duty on the parent's part but also holding that evidence of a more specific undertaking, including inspecting a coal mine's roof problems, offering advice about roof control, and telling the mine manager that the mine's roof was adequate, could lead to the conclusion that defendant assumed a duty to advise and therefore summary judgment was inappropriate).

In the instant case, plaintiff argues that G.E.'s safety audit program was a sufficient affirmative undertaking to create an independent duty to Edwards to provide a safe working environment at GELS. The evidence establishes that G.E. provided safety goals and objectives to GELS along with tools to help GELS implement safety programs. Safety concerns entered into PowerSuite and HSF were entirely the responsibility of GELS' employees to correct. This was true even if the concerns were entered into the audit tracking program by G.E. personnel.

IV. Conclusion

The biannual verification audits conducted by G.E. personnel were intended to ensure that GELS was utilizing PowerSuite correctly and effectively in light of G.E.'s goals and objectives. These audits were a general review and were not intended to be extensive safety audits of the entire GELS plant. Day-to-day safety at the GELS facility was always the exclusive responsibility of GELS personnel. There are

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no allegations of any specific undertaking by G.E. that would create a genuine issue of material fact that G.E. went beyond concern or minimal contact about safety matters and assumed the primary responsibility for workplace safety at GELS. Accordingly, the trial court properly granted summary judgment to G.E.

Affirmed.

Judges WYNN and ELMORE concur.

TELERENT LEASING CORP., D/B/A VENDOR CAPITAL GROUP, PLAINTIFF v.
MORDECHAI BOAZIZ, DEFENDANT

No. COA09-171

(Filed 3 November 2009)

1. Guaranty— motion for directed verdict—motion for judgment notwithstanding verdict—co-lessee

The trial court did not err in an action seeking recovery for lease defaults by denying defendant's motions for directed verdict and JNOV where defendant signed an agreement as an officer of the LLCs and also as co-lessee. The meaning of co-lessee was to be determined by the jury and when an individual signs an instrument in a representative capacity and in a personal capacity, the individual is personally liable on the contract.

2. Appeal and Error— preservation of issues—failure to object—motion in limine

Defendant did not preserve for appeal an evidence issue concerning a bankruptcy proceeding where defendant did not object below and used the challenged document when questioning a witness.

3. Costs— attorney fees—fifteen percent cap

By awarding \$92,208.76 in attorney fees on a \$421,680.67 verdict, the trial court did not violate the fifteen percent cap mandated by N.C.G.S. § 6-21.2 because the balance of the debt collected in both the current action and the reasonably related Kansas bankruptcy proceeding was \$724,315.67, making the trial court's award well below the statutory ceiling.

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Appeal by defendant from judgment and orders entered 15 August 2008 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 2 September 2009.

Wyrick Robbins Yates & Ponton, LLP, by Hon. K. Edward Greene and Tobias S. Hampson, for plaintiff-appellee.

Manning, Fulton & Skinner, P.A., by Michael T. Medford and William S. Cherry, III, for defendant-appellant.

JACKSON, Judge.

Defendant Mordechai Boaziz (“defendant”) appeals the 15 August 2008 judgment in favor of plaintiff Telerent Leasing Corp. d/b/a Vendor Capital Group (“plaintiff”), the 15 August 2008 order denying his motion for judgment notwithstanding the verdict, and the 15 August 2008 order granting plaintiff’s motion for costs and legal fees. For the reasons stated herein, we hold no error.

Defendant, through three separate limited liability companies (LLCs), owned or partially owned three hotels in Wichita, Kansas. In mid-July 2001 through August 2001, each LLC entered into a separate Master Lease Agreement and related Equipment Schedule (collectively “Agreements”) with plaintiff for electronic equipment used by the hotels, such as TVs, electronic locks, and telephone systems. Plaintiff understood that defendant was a 100% owner of all three hotels. Defendant signed the Agreements once as “Lessee” on behalf of each LLC and again as “Co-Lessee.” The Agreements went into default, and in December 2004, all three hotels filed for bankruptcy. Plaintiff repossessed the equipment, sold it, and applied the \$302,635.00 credit to the amounts due under the Agreements. On 4 November 2005, plaintiff sued defendant, as co-lessee, for the remaining deficiency.

The case was stayed pending the resolution of the bankruptcy proceedings in Kansas. On 11 August 2008 defendant moved *in limine* to preclude plaintiff’s introduction into evidence of a document entitled “Objection to Motion for Relief From Stay and For Abandonment of Leave” filed in the United States Bankruptcy Court, District of Kansas. The court denied defendant’s motion. At the end of plaintiff’s evidence, defendant moved for directed verdict, which was denied. At the close of all evidence, defendant again moved for directed verdict, and it was again denied. On 12 August 2008 the jury returned a verdict in favor of plaintiff for \$421,680.67. The trial court also awarded \$1,733.65 for costs and \$92,208.76 for attorneys’ fees.

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Defendant filed a motion for judgment notwithstanding the verdict on 13 August 2008, which was denied on 15 August 2008. Defendant appeals the denial of his motions for directed verdict and for judgment notwithstanding the verdict, the denial of his motion *in limine*, and the award of attorneys' fees in an amount that violates North Carolina General Statutes, section 6-21.2.

[1] Defendant's first argument is that the trial court improperly denied both his motion for directed verdict and his motion for judgment notwithstanding the verdict. We disagree.

When reviewing a ruling on a motion for directed verdict or judgment notwithstanding the verdict, the standard of review is sufficiency of the evidence.

The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury. Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, this Court has required the use of the same standard of sufficiency of evidence in reviewing both motions.

Turner v. Ellis, 179 N.C. App. 357, 361-62, 633 S.E.2d 883, 887 (2006) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991)). Motions for directed verdict are intended "to test the legal sufficiency of the evidence" and "should be denied if there is any evidence more than a scintilla to support plaintiffs' prima facie case[.]" *Wallace v. Evans*, 60 N.C. App. 145, 146, 298 S.E.2d 193, 194 (1982).

In the case *sub judice*, plaintiff presented sufficient evidence concerning defendant's liability under the Agreements to overcome a directed verdict as well as sufficient evidence to allow the jury's verdict to stand. "When the language of a written contract is plain and unambiguous, the contract must be interpreted as written and the parties are bound by its terms." *Atlantic & E. Carolina Ry. Co. v. Wheatley Oil Co.*, 163 N.C. App. 748, 752, 594 S.E.2d 425, 429 (2004) (quoting *Five Oaks Homeowners Assoc., Inc. v. Efirds Pest Control Co.*, 75 N.C. App. 635, 637, 331 S.E.2d 296, 298 (1985)). However,

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“‘where [the contract] is ambiguous and the intention of the parties is unclear, interpretation of the contract is for the jury.’” *Kimbrell v. Roberts*, 186 N.C. App. 68, 73, 650 S.E.2d 444, 447 (2007) (quoting *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993)). “An ambiguity exists where the terms of the contract are reasonably susceptible to either of the differing interpretations proffered by the parties.” *Id.* (citing *Glover*, 109 N.C. App. at 456, 428 S.E.2d at 209). “The fact that a dispute has arisen as to the parties’ interpretation of the contract is some indication that the language of the contract is, at best, ambiguous.” *Id.* (quoting *Glover*, 109 N.C. App. at 456, 428 S.E.2d at 209).

Defendant signed the Agreements two times, once as an officer of the LLCs and once individually as “co-lessee.” Defendant contends that his second signature only bound him to a single provision of the Agreements, which specifically referred to a “co-lessee.” Plaintiff, however, argues that the inherent meaning of the term “co-lessee” is “joint lessee” or having joint liability under the Agreements. This ambiguity, on which the case hinges, is one to be determined by the jury. Denying defendant’s motion for directed verdict was, therefore, proper.

Plaintiff’s evidence also is sufficient to survive a motion for judgment notwithstanding the verdict. When a party signs an instrument twice, once in a representative capacity and once in a personal capacity, the individual is personally liable on the contract. *See RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 742-43, 600 S.E.2d 492, 497 (2004) (citing *Keels v. Turner*, 45 N.C. App. 213, 218, 262 S.E.2d 845, 847 (1980) (“‘[W]here individual responsibility is demanded, the nearly universal practice in the commercial world is that the corporate officer signs twice, once as an officer and again as an individual.’”)). Furthermore, defendant provided his personal financial information to plaintiff prior to plaintiff’s approval of the leases. Even though defendant argues that the term “co-lessee” is used only once in the Agreements and that the other provisions of the Agreements, therefore, do not apply to a co-lessee, plaintiff presented sufficient evidence to make the issue of defendant’s personal liability a question for the jury. We hold that the trial court properly denied defendant’s motions for directed verdict and for judgment notwithstanding the verdict.

[2] Defendant next contends that the trial court erred in denying his motion *in limine* to prevent the introduction into evidence of the “Objection to Motion for Relief from Stay and for Abandonment of

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Leave” filed in the United States Bankruptcy Court for the District of Kansas. We hold, however, that defendant did not preserve this issue for appeal.

A trial court’s ruling on a motion *in limine* is “merely preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial[.]” *State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997) (quoting *T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49, *disc. rev. denied*, 346 N.C. 185, 486 S.E.2d 219 (1997)), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998). In order for a party to preserve this issue for appeal,

[a] party objecting to an order granting or denying a motion *in limine* . . . is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted).

Id. (quoting *T&T Development Co.*, 125 N.C. App. at 602, 481 S.E.2d at 349).

In the instant case, defendant neither objected to plaintiff’s line of questions that concerned the document nor objected to the admission of the document into evidence. In fact, defendant’s counsel also used the document when questioning defendant. Because defendant failed to object to the introduction of this evidence at trial and therefore, failed to preserve the issue of the admissibility of the “Objection to Motion for Relief from Stay and for Abandonment of Leave” for appeal, we decline to address it here.

[3] Defendant’s final argument is that the trial court erred in awarding \$92,208.76 in attorneys’ fees on a \$421,680.67 verdict, in violation of the fifteen percent cap mandated by North Carolina General Statutes, section 6-21.2. We disagree.

As a general rule, in order “ ‘to overturn the trial judge’s determination [on the issue of attorneys’ fees], the defendant must show an abuse of discretion.’ ” *Bruning & Federle Mfg. Co. v. Mills*, 185 N.C. App. 153, 155, 647 S.E.2d 672, 674 (2007) (quoting *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 155, 296 S.E.2d 302, 309 (1982), *disc. rev. denied*, 307 N.C. 468, 299 S.E.2d 221 (1983)).

A prevailing party is not entitled to attorneys’ fees unless expressly authorized by statute. *Hicks v. Albertson*, 284 N.C. 236, 238,

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200 S.E.2d 40, 42 (1973). North Carolina General Statutes, section 6-21.2 provides, in relevant part,

Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:

....

(2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

N.C. Gen. Stat. § 6-21.2 (2007). This statute "is a remedial statute and should be construed liberally[.]" *Coastal Production v. Goodson Farms*, 70 N.C. App. 221, 227, 319 S.E.2d 650, 655 (1984) (citing *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 293, 266 S.E.2d 812, 817 (1980)).

This Court previously has held that "allowance of fees for participation in other proceedings to expedite collection or preserve assets would not constitute abuse of discretion." *Id.* at 228, 319 S.E.2d at 656. Specifically, we stated that "when other actions are reasonably related to the collection of the underlying note sued upon, attorneys' fees incurred therein may properly be awarded under G.S. 6-21.2[.]" *Id.* at 227-28, 319 S.E.2d at 655. "Of course, the burden remains on the claimant to present evidence that the other proceedings are reasonably related to collection of the note." *Id.* at 228, 319 S.E.2d at 656 (citing *Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980)). "[T]he law requires evidence and findings of fact supporting the reasonableness of the award." *Id.* at 226, 319 S.E.2d at 655 (citing *Falls v. Falls*, 52 N.C. App. 203, 278 S.E.2d 546, *disc. rev. denied*, 304 N.C. 390, 285 S.E.2d 831 (1981); *In re Ridge*, 302 N.C. 375, 275 S.E.2d 424 (1981)).

In the instant case, the Agreements provide only that in the event of default, lessee is responsible to lessor for "reasonable attorney's fees." The trial court found as fact that the attorneys' fees were rea-

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sonable “in light of the multiple actions and multiple venues through which Plaintiff had to pursue collection[.]” The trial court also found that “[a]s a result of the Plaintiff’s efforts, including the expenditure of \$31,311.19 of attorney fees in the ancillary Kansas bankruptcy proceedings, the defendant received a \$302,635 credit on the amounts due and payable under the Master Lease Agreements.” We are satisfied that the Kansas bankruptcy proceeding was reasonably related to the current action and to the collection of the debt pursuant to the Agreements. Considering that the balance of the debt collected in both the current action and the Kansas bankruptcy proceeding was \$724,315.67, the trial court’s award of \$92,208.76 was well below the statutory ceiling of fifteen percent. In light of the mandate to construe the statute liberally and in acknowledgment of the practicality of encouraging early intervention to mitigate a debt, we hold that the trial court did not err in awarding plaintiff \$92,208.76 in attorneys’ fees.

For the reasons stated herein, we hold that the trial court did not err in denying defendant’s motions for directed verdict and judgment notwithstanding the verdict. We hold that the trial court’s ruling on defendant’s motion *in limine* was not preserved for appeal. We also hold that the trial court’s award of attorneys’ fees was not an abuse of discretion.

No error.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA v. NATHANIEL VANDIS WILLIAMS

No. COA09-289

(Filed 3 November 2009)

1. Indictment and Information— guilty plea—information

The Court of Appeals granted defendant’s petition for *writ of certiorari* under N.C. R. App. P. 21 in a delivery of a controlled substance case and concluded that the trial court did not err by accepting defendant’s guilty plea because there was no variance, much less a fatal variance, between the allegations contained in the information and the prosecutor’s stated factual basis for the plea agreement.

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2. Sentencing— prior record level—delivery of controlled substance

The trial court did not err in a delivery of a controlled substance case by concluding that defendant was a Level IV offender for sentencing purposes.

Appeal by Defendant from judgment entered 3 November 2008 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 3 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General Patrick S. Wooten, for the State.

Ryan McKaig for Defendant.

STEPHENS, Judge.

I. Procedural History and Factual Background

On 18 September 2008, Defendant Nathaniel Vandis Williams was arrested on charges of possession with intent to sell and deliver a controlled substance and sale and delivery of that controlled substance. On 3 November 2008, Defendant waived indictment and entered a guilty plea to an information alleging one count of delivery of the controlled substance, cocaine. On the same day, the State dismissed the charges of possession with intent to sell and deliver a controlled substance and sale of a controlled substance. In Wake County District Court, Defendant stipulated to being a prior record Level IV for sentencing purposes, and the trial court so found. The trial court sentenced Defendant to 11 to 14 months imprisonment and recommended participation in the DART program. From the judgment entered upon his guilty plea, Defendant appeals.

II. Discussion

[1] Defendant first argues that the trial judge erred in accepting his guilty plea as there was no factual basis for his plea in violation of N.C. Gen. Stat. § 15A-1022. We disagree.

We note first that Defendant does not have an appeal as a matter of right to challenge the trial court's acceptance of his guilty plea. N.C. Gen. Stat. § 15A-1444 (2007); *see State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987) (defendant not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea). However, pursuant to N.C. R. App. P. 21, Defendant has petitioned this Court for a writ of certiorari. We

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elect to grant Defendant's petition and review the issue. *See State v. Poore*, 172 N.C. App. 839, 616 S.E.2d 639 (2005) (treating defendant's appeal as petition for writ of certiorari and addressing defendant's argument that there was an insufficient factual basis supporting the entry of his plea); *State v. Rhodes*, 163 N.C. App. 191, 592 S.E.2d 731 (2004) (defendant's appeal treated as writ of certiorari and defendant's challenge to the procedures employed in accepting his guilty plea addressed).

N.C. Gen. Stat. § 7A-272 provides:

With the consent of the presiding district court judge, the prosecutor, and the defendant, the district court has jurisdiction to accept a defendant's plea of guilty or no contest to a Class H or I felony if:

(1) The defendant is charged with a felony in an information filed pursuant to G.S. 15A-644.1, the felony is pending in district court, and the defendant has not been indicted for the offense

N.C. Gen. Stat. § 7A-272(c)(1) (2007).¹ A defendant who pleads guilty in district court pursuant to N.C. Gen. Stat. § 7A-272(c)(1) shall enter that plea to an information. N.C. Gen. Stat. § 15A-644.1 (2007). An information "is a written accusation by a prosecutor . . . charging a person represented by counsel with the commission of one or more criminal offenses." N.C. Gen. Stat. § 15A-641(b) (2007). The information must contain (1) the name of the district court in which it is filed, (2) the title of the action, (3) criminal charges pleaded as provided in Article 49 of Chapter 15A, and (4) the signature of the prosecutor,² and must also contain or have attached the waiver of indictment. N.C. Gen. Stat. § 15A-644(a) and (b); N.C. Gen. Stat. § 15A-644.1.

Moreover, pursuant to N.C. Gen. Stat. § 15A-1022, "[t]he judge may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea. This determination may be based upon . . . [a] statement of the facts by the prosecutor." N.C. Gen. Stat. § 15A-1022(c) (2007).

In this case, Defendant pled guilty to an information alleging delivery of cocaine, a controlled substance. At the hearing on De-

1. Where an appeal from a plea authorized by N.C. Gen. Stat. § 7A-272(c) lies, such appeal is to the appellate division. N.C. Gen. Stat. § 7A-272(d) (2007).

2. The omission of the signature of the prosecutor is not a fatal defect. N.C. Gen. Stat. §§ 15A-644(a)(4) and (b) (2007).

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defendant's guilty plea, the prosecutor made a statement of the facts which supported the charge of delivery of cocaine. When asked by the trial court if Defendant had anything to add regarding the factual basis, defense counsel answered, "Nothing on the factual basis, Your Honor." The trial court then determined that, "after consideration of the record, the evidence presented, the answers of the [D]efendant, the statements of the lawyer for the [D]efendant, and the District Attorney, the Court will find that there is a factual basis for the entry of the plea[.]" Defendant now contends that there was no factual basis for the plea as there was a fatal variance between the facts alleged in the "charging instrument" and the facts as stated by the prosecutor. Defendant's argument is misplaced.

The arrest warrant states that Defendant sold and delivered cocaine to "Detective T. Ross[.]" The information refers to "Terry Ross" as the person to whom Defendant was charged with delivering cocaine. At the hearing on Defendant's guilty plea, the prosecutor stated: "[O]n a Thursday at about 12:40 in the afternoon, [Raleigh police] utilized the named informant in the charging document to make controlled purchases of cocaine. Detective Gibney [sic] utilized this CI." Defendant argues it is unlikely that the "named informant" referred to in the prosecutor's statement is a police officer, as the arrest warrant suggests.

However, Defendant entered a plea of guilty to an information, as required by N.C. Gen. Stat. § 15A-644.1. Thus, the information, not the arrest warrant, was the "charging instrument" in this case. Furthermore, there is no evidence before this Court that "Terry Ross" and the "named informant" were not the same person. Accordingly, we conclude there was no variance, much less a fatal variance, between the allegations contained in the information and the prosecutor's stated factual basis for the plea agreement. Thus, the trial court did not err in accepting Defendant's plea. Defendant's assignment of error is overruled.

[2] Defendant next argues that the trial court erred in determining that Defendant was a Level IV offender for sentencing purposes. Specifically, Defendant contends that the trial court erred in adding an additional sentencing point on the ground that one of Defendant's prior offenses included all of the elements of his present conviction for delivery of cocaine. We disagree.

Under N.C. Gen. Stat. § 15A-1444, "a defendant who has pled guilty has . . . the right to appeal . . . whether the sentence results from

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an incorrect finding of the defendant's prior record level under N.C. Gen. Stat. § 15A-1340.14[.]" *State v. Carter*, 167 N.C. App. 582, 584, 605 S.E.2d 676, 678 (2004). A defendant's prior record level "is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with [section 15A]." N.C. Gen. Stat. § 15A-1340.14(a) (2007). Furthermore, an additional point is added "[i]f all the elements of the present offense are included in any prior offense for which the offender was convicted[.]" N.C. Gen. Stat. § 15A-1340.14(6) (2007).

We note first that Defendant stipulated to being a Level IV offender and specifically stipulated to the addition of one point to his prior record level based on "the elements of this crime [being] associated with previous crimes[.]"³ However, while "a stipulation by [a] defendant may be sufficient to prove [the] defendant's prior record level, the trial court's assignment of a prior record level is a conclusion of law, which we review *de novo*." *State v. Mack*, 188 N.C. App. 365, 380, 656 S.E.2d 1, 12 (2008) (citing *State v. Fraley*, 182 N.C. App. 683, 690, 643 S.E.2d 39, 44 (2007)). "Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate" *State v. Prush*, 185 N.C. App. 472, 480, 648 S.E.2d 556, 561 (2007) (citations and quotation marks omitted), *disc. review denied*, 362 N.C. 369, 663 S.E.2d 855 (2008). Furthermore, a trial court's determination of whether all the elements of a present offense are included in any prior offense involves the resolution of a matter of law, reviewable *de novo* on appeal. *Id.* Accordingly, we must review the trial court's calculation of Defendant's prior record level, despite Defendant's stipulation at the plea hearing. We conclude that the trial court correctly determined that Defendant was a Level IV offender by adding one point to his prior record level based on N.C. Gen. Stat. § 15A-1340.14(6).

We find support for our conclusion in *State v. Ford*, — N.C. App. —, 672 S.E.2d 689 (2009). In *Ford*, defendant argued that the trial court erred in determining his prior record level as the court impermissibly assigned one prior conviction point on the basis that all of the elements of attempted felonious larceny, of which defendant was found guilty, were included in a prior offense for which defendant was convicted. Specifically, defendant contended that "neither of [his] prior felonious larceny convictions included,

3. The addition of one point pursuant to N.C. Gen. Stat. § 15A-1340.14(6) elevated Defendant from a Level III to a Level IV offender.

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as ‘elements’ of the crimes, that [d]efendant took property valued over \$ 1,000[,]” *id.* at , 672 S.E.2d at 690, as required by N.C. Gen. Stat. § 14-72(a) which states that “[l]arceny of goods of the value of more than one thousand dollars (\$ 1,000) is a Class H felony.” *Id.* (quoting N.C. Gen. Stat. § 14-72(a)).

This Court, noting that this contention had already “been addressed and rejected by prior decisions of our courts[,]” *id.*, explained:

In North Carolina, larceny remains a common law crime and is defined as “ ‘the felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter’s consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker’s own use.’ ” Our Supreme Court has held that “[N.C. Gen. Stat. §] 14-72 relates solely to punishment for the separate crime of larceny,” and this Court has concluded that “[t]he statutory provision upgrading misdemeanor larceny to felony larceny does not change the nature of the crime; the elements of proof remain the same.”

Id. (internal citations omitted). Thus, this Court concluded that “for purposes of N.C. Gen. Stat. § 15A-1340.14(b)(6), it matters not under what provision of N.C. Gen. Stat. § 14-72 [d]efendant’s prior felony larceny convictions were established” and held that the trial court properly determined defendant’s prior record level. *Id.*

N.C. Gen. Stat. § 90-95(a)(1) provides:

(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]

N.C. Gen. Stat. § 90-95(a)(1) (2007). “To prove sale and/or delivery of a controlled substance, the State must show a transfer of a controlled substance by either sale or delivery, or both.” *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citing *State v. Moore*, 327 N.C. 378, 382, 395 S.E.2d 124, 127 (1990)).

In this case, Defendant pled guilty to delivery of a controlled substance, identified as cocaine, “in violation of N.C. [Gen. Stat.] § 90-95(a)(1).” Cocaine is included in Schedule II of the North

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Carolina Controlled Substances Act. Defendant was previously convicted of delivery of a controlled substance, marijuana, in violation of N.C. Gen. Stat. § 90-95(a)(1). Marijuana is included in Schedule VI of the North Carolina Controlled Substances Act.

While delivery of a Schedule II controlled substance is punishable under N.C. Gen. Stat. § 90-95(b)(1) and delivery of a Schedule VI controlled substance is punishable under N.C. Gen. Stat. § 90-95(b)(2), as in *Ford*, the statutory provision for punishing delivery of cocaine differently from delivery of marijuana “ ‘does not change the nature of the crime; the elements of proof remain the same.’ ” *Ford*, — N.C. App. at —, 672 S.E.2d at 690 (citation omitted). Thus, as in *Ford*, for purposes of N.C. Gen. Stat. § 15A-1340.14(b)(6), it matters not under what provision of N.C. Gen. Stat. § 90-95 Defendant’s prior conviction for delivery of a controlled substance was punishable. Accordingly, we conclude that the trial court properly determined Defendant’s prior record level. The assignment of error upon which Defendant’s argument is based is overruled.

AFFIRMED.

Judges HUNTER, JR. and BEASLEY concur.

IN THE MATTER OF: N.B., I.B., AND A.F.

No. COA09-811

(Filed 3 November 2009)

1. Termination of Parental Rights— findings—parent’s mental or other incapability—substance abuse

Respondent’s argument in a termination of parental rights case that there was insufficient evidence to support the trial court’s conclusion that she had a mental or other incapability was overruled. Incapability may be the result of substance abuse or mental illness under N.C.G.S. § 7B-1111(a)(6) and the evidence indicated that respondent had a history of substance abuse and mental illness which interfered with her ability to parent her children.

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2. Termination of Parental Rights— findings—alternative child care arrangements

The trial court erred in a termination of parental rights case by finding and concluding that DSS proved that respondent lacked an alternative child care arrangement, and the case was reversed and remanded for further findings of fact on this issue.

3. Termination of Parental Rights— guardian ad litem representation—prior violations cannot be used

The trial court did not violate respondent's rights in a termination of parental rights proceeding by allegedly failing to ensure that the children had proper *guardian ad litem* representation throughout every critical stage of the proceeding. Any alleged violation of N.C.G.S. § 7B-601(a) with respect to prior termination hearings may not be used to challenge the order presently on appeal.

Appeal by Respondent from order entered 20 April 2009 by Judge Beverly Scarlett in Orange County District Court. Heard in the Court of Appeals 14 September 2009.

Orange County Department of Social Services, by Lisa W. Reynolds and Carol J. Holcomb, for Petitioner-Appellee.

Richard Croutharmel for Respondent-Appellant. Pamela Newell Williams for Guardian ad Litem.

BEASLEY, Judge.

Respondent appeals from the order terminating her parental rights to the minor children, N.B., I.B., and A.F.¹ We reverse and remand in part and affirm in part.

On 7 May 2007, Orange County Department of Social Services (DSS) filed juvenile petitions alleging that N.B., I.B., and A.F. were neglected juveniles. By order entered 28 September 2007, the children were adjudicated neglected and dependent juveniles. On 15 November 2007, the trial court conducted a permanency planning hearing at which the trial court ceased reunification efforts and changed the permanent plan to adoption.

On 14 January 2008, DSS filed a motion to terminate Respondent's parental rights. On 27 June 2008, the trial court entered an

1. To protect their privacy, all minors are referred to by their initials in this opinion.

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order terminating Respondent's parental rights. Respondent gave notice of appeal.

While the appeal was pending, the trial court conducted a second termination hearing on 6 November 2008 and again terminated Respondent's parental rights. On 28 January 2009, Respondent filed a motion to vacate the second termination order because the trial court lacked subject matter jurisdiction. By order entered on 5 February 2009, the trial court vacated the second termination order.

On 20 January 2009, this Court reversed the 27 June 2008 termination order, and remanded for a new hearing because DSS failed to present evidence to support a conclusion that grounds for terminating parental rights existed. *In re N.B.*, — N.C. App. —, 670 S.E.2d 923 (2009). Consequently, the trial court conducted another termination hearing on 19 March 2009. The trial court found grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), and entered an order terminating Respondent's parental rights on 17 April 2009. Respondent appeals.

On appeal, Respondent argues that the trial court erred in finding and concluding that grounds existed to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a)(6).

Termination of parental rights cases involve two separate components. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). At the adjudicatory stage, "the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002). This Court reviews the adjudicatory stage to determine "whether the trial court's findings of fact are based on clear, cogent, and convincing evidence and whether those findings support the trial court's conclusion that grounds for termination exist pursuant to N.C. Gen. Stat. § 7B-1111." *In re C.W. & J.W.*, 182 N.C. App. 214, 219, 641 S.E.2d 725, 729 (2007) (citation omitted).

If the trial court determines that a ground for termination exists, it then conducts a disposition hearing, to determine whether termination is in the best interest of the child. N.C. Gen. Stat. § 7B-1110(a)(2007). The standard for appellate review of the trial court's decision to terminate parental rights is abuse of discretion. *In re Brim*, 139 N.C. App. 733, 745, 535 S.E.2d 367, 374 (2000).

A trial court may terminate parental rights upon finding

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[t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111(a)(6)(2007).

[1] First, Respondent argues that there was no evidence that she had a mental or other incapability. We note that the statute provides that incapability may be the result of substance abuse or mental illness. N.C. Gen. Stat. § 7B-1111(a)(6) (2007). In this case, there was evidence presented that Respondent had a history of substance abuse and mental illness.

Respondent also contends that several of the trial court's findings of fact are not supported by the evidence. The trial court made the following pertinent findings of fact:

9. Respondent mother has an extensive history of substance abuse.

10. Respondent mother admitted and this Court finds that Respondent mother sold drugs from the age of eighteen (18) to the age of twenty-three (23).

....

13. Respondent mother was convicted of possession of illegal drugs with intent to manufacture, sell and deliver.

14. Respondent mother was incarcerated on April 29, 2008, and she remains incarcerated to date. Her release date is August 8, 2009.

15. After the juveniles were ordered into OCDSS custody, Respondent mother was ordered to participate in Family Treatment Court, a court which attempts to help parents recover from drug addictions so that they may be reunited with their children. She did not comply with the requirements of Family Treatment Court and was therefore terminated.

16. Five months after the beginning of her current incarceration, Respondent mother began participating in a program offered to

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inmates which is called the “Latch” program. Her children had been in DSS custody for over a year (15 months) before Respondent-Mother began this treatment. By participating in this program, Respondent mother has made efforts to improve herself. Respondent mother claims that upon her release, she will continue her substance abuse treatment.

17. During the course of OCDSS involvement, Respondent mother did not follow a case plan which would have supported a plan of reunification. She failed to make scheduled appointments and it was difficult to stay in touch with her by telephone or otherwise.

18. Respondent mother has a criminal history, which includes charges and convictions related to the use and sale of drugs.

19. Throughout the course of the lives of the juveniles, they have been left in the care of family members without any information regarding Respondent-Mother’s whereabouts or return. The current caretakers of the juveniles have been in their lives since birth.

. . . .

21. Respondent mother is incapable of parenting her children. Her incapability is likely to continue for the foreseeable future.

22. Her drug use and addiction interferes with her ability to parent her children. Her drug use and addiction has been long term, and her self-reported commitment to treatment has just recently occurred. She has not proven that she will maintain this commitment after her release from incarceration, but even if she does maintain her commitment to treatment, she will need a substantial and indefinite amount of time to address her addictions sufficiently to be able to parent the minor children. The needs of the children cannot wait.

23. OCDSS has met their burden of proof and the facts upon which the court bases this order are proven by clear, cogent and convincing evidence.

Of the above-cited findings, Respondent challenges only findings of fact 9, 19, 21, 22, and 23. Respondent had an extensive history of substance abuse, as well as an extensive criminal history related to the use and sale of drugs. The evidence also indicated that

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Respondent's substance abuse and criminal activity interfered with her ability to parent the children or to follow the case plan recommended by DSS. The DSS social worker testified about the difficulties she had contacting Respondent. In fact, the social worker was never able to meet with Respondent after Respondent failed to report for a scheduled meeting. The social worker testified that Respondent very briefly attempted to comply with her case plan. Under the case plan, Respondent was required to attend parenting classes, submit to random drug screens, participate in mental health treatment, maintain stable housing and employment, and comply with probation and the court system. Respondent last saw the children in February 2008. At the time of the termination hearing, Respondent was incarcerated for violating her probation. During her incarceration, Respondent had not written to inquire about the children.

A careful review of the record shows that the challenged findings of fact are supported by the evidence. The remaining findings cited above are unchallenged by Respondent. Findings of fact that are not challenged on appeal are deemed supported by the evidence and are binding upon this Court. *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003).

[2] Respondent further contends that DSS failed to prove, and the trial court failed to conclude, that she lacked an alternative childcare arrangement. She cites her testimony that the people with whom she left the children were the same people that DSS proposed as adoptive parents. On this basis, Respondent argues she offered an alternative childcare arrangement, and the children do not meet the statutory definition for dependence. We agree that the trial court did not make a finding nor conclude as a matter of law that Respondent lacked an adequate childcare arrangement.

For a trial court to terminate parental rights, "[s]ection 7B-1111(a)(6) requires that in addition to a parent having a condition which renders her unable or unavailable to parent the juvenile, the parent also must have no appropriate alternative child care arrangement in order to terminate parental rights. Absent such a finding of fact, the order does not support the conclusion of law that sufficient grounds exist pursuant to *section 7B1111(a)(6)* to terminate respondent's parental rights." *In re C.N.C.B.*, — N. C. App. —, 678 S.E.2d 240, — (2009) (Emphasis added).

In the case before us, the trial court states in finding number 19 above that the children have been left in the care of family members,

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including the current ones who have been in the children's lives "since birth". The trial court makes additional findings of fact regarding Respondent's substance abuse and treatment and about Respondent's inability to parent the children. The trial court however does not make any findings of fact which directly address whether Respondent lacked an appropriate alternative childcare arrangement. Accordingly, we reverse and remand for further findings of fact on this issue.

[3] Lastly, Respondent argues that the trial court violated her rights and committed reversible error by failing to ensure that the children had proper guardian ad litem (GAL) representation throughout every critical stage of the proceeding. Anne Scaff was appointed as the children's GAL. However, Scaff resigned approximately one year before the 19 March 2009 termination hearing. Therefore, Respondent contends that the children did not have proper GAL representation, acting on their behalf and performing the duties required by N.C. Gen. Stat. § 7B-601 (2007), at each of the three termination hearings.

The 20 April 2009 order terminating Respondent's parental rights is the only order currently before this Court on appeal. By order filed on 19 March 2009, Kristen Wicher was appointed as the children's GAL. Therefore, the children were represented by a GAL at the 19 March 2009 termination hearing. We find that any alleged violation of N.C. Gen. Stat. § 7B-601(a) (2007), with respect to the prior termination hearings, may not be used to challenge the 17 April 2009 order. *See In re O.C.*, 171 N.C. App. 457, 615 S.E.2d 391 (2005) (holding an order terminating parental rights should be affirmed when the children were represented by a GAL at the termination hearing but were unrepresented during prior hearings not on direct appeal). Accordingly, this assignment of error is overruled.

Reversed and remanded in part; and Affirmed in part.

Judges GEER and HUNTER, JR. concur.

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[200 N.C. App. 780 (2009)]

E. ANTHONY MUSARRA, II, M.D.P.C., PLAINTIFF v. DAVID E. BOCK, DEFENDANT

No. COA09-249

(Filed 3 November 2009)

1. Appeal and Error— preservation of issues—failure to argue personal jurisdiction

The superior court did not err in a case involving default on promissory notes by concluding it had personal jurisdiction over defendant where defendant failed to raise the defense in his answer.

2. Guaranty— promissory notes—subject matter jurisdiction

The superior court did not err in a case involving default on promissory notes by concluding that it had subject matter jurisdiction because the promissory notes were guaranteed by defendant in order to secure funds for the development of real estate in North Carolina, the notes were each in excess of \$10,000, and plaintiff's action is a civil matter for the collection of a debt that is not otherwise delegated to the district court division.

3. Appeal and Error— preservation of issues—failure to object—waiver

Defendant failed to preserve his statute of limitations argument for appeal in a case involving default on promissory notes because defendant did not challenge the superior court's conclusion of law that defendant was barred from asserting the statute of limitations defense and, even if defendant had preserved the argument for appeal, defendant waived all statutes of limitations defenses in the guarantees.

Appeal by defendant from judgment entered 3 October 2009 by Judge C. Philip Ginn in Macon County Superior Court. Heard in the Court of Appeals 16 September 2009.

Jones, Key, Melvin & Patton, P.A. by Fred H. Jones, for plaintiff-appellee.

Creighton W. Sossomon, for defendant-appellant.

STEELMAN, Judge.

The misspelling of defendant's name on the summons implicated personal jurisdiction issues which defendant waived by not raising

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them in his answer. The Superior Court of Macon County had subject matter jurisdiction over the case since actions for the collection of a debt greater than \$10,000.00 fall under the original jurisdiction of the superior court pursuant to N.C. Gen. Stat. §§ 7A-240 and 243 (2007). Defendant failed to preserve his statute of limitations argument on appeal.

I. Factual and Procedural Background

Bock Homes, Inc. executed an undated promissory note to E. Anthony Musarra II, M.D.P.C. (plaintiff) in the principal amount of twenty-five thousand dollars (\$25,000.00). On 28 April 1994, David E. Bock (defendant) executed a personal guaranty of the twenty-five thousand dollar note. Bock Homes, Inc. executed a second promissory note, dated 1 May 1995 to plaintiff in the original principal amount of twenty-five thousand dollars (\$25,000.00). On 1 May 1995, defendant executed a personal guaranty of the second note.

On 24 April 2006, plaintiff filed a complaint in this action seeking the balance due on the notes, together with interest and attorney's fees. On 3 December 2007, defendant filed an answer to the complaint, asserting the affirmative defenses of the statute of limitations and lack of subject matter jurisdiction. This matter was heard by Judge Ginn, sitting without a jury. In a judgment dated 19 September 2008, the trial court ordered that plaintiff have and recover of defendant the sum of \$89,043.00 together with attorney's fees in the amount of \$13,356.45. Defendant appeals.

II. Standard of Review

"This Court's review of a trial court's conclusions of law is limited to whether they are supported by the findings of fact." *In re J.L.*, 183 N.C. App. 126, 130, 643 S.E.2d 604, 606 (2007) (citation omitted); *see also Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *writ of supersedeas and disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001). Since Bock does not challenge any of the trial court's findings of fact, we review this matter only to determine if those findings of fact support the trial court's legal conclusions. *Lumsden v. Lawing*, 107 N.C. App. 493, 499, 421 S.E.2d 594, 598 (1992).

III. Personal Jurisdiction

[1] In his first argument, defendant contends that the superior court did not have personal jurisdiction over Bock because he was not properly named in the summons. We disagree.

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Defendant's argument is predicated on the misspelling of his name on the face of the summons. Insufficiency of process is a defense that implicates personal jurisdiction and can be waived. *In re J.T. (I)*, *J.T. (II)*, *A.J.*, 363 N.C. 1, 4, 672 S.E.2d 17, 19 (2009); *see also In re K.J.L.*, 363 N.C. 343, 348, 677 S.E.2d 835, 838 (2009) (lack of a required signature on summons implicated personal jurisdiction though the defect was waived where defendants appeared generally). "Objections to a court's exercise of personal (in personam) jurisdiction . . . must be raised by the parties themselves and can be waived in a number of ways." *In re J.T. (I)*, 363 N.C. at 4, 672 S.E.2d at 18 (citing N.C. Gen. Stat. § 1A-1, Rule 12(h)(1)). Rule 12(h)(1) of the North Carolina Rules of Civil Procedure provides:

A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or amendment thereof permitted by Rule 15(a) to be made as a matter of course.

N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (2007). Defendant failed to raise the defense of lack of personal jurisdiction in his answer and cannot raise this issue for the first time on appeal. *Id.*; *see also Shores v. Shores*, 91 N.C. App. 435, 436, 371 S.E.2d 747, 748 (1988) (A defendant waives his right to contest personal jurisdiction where he raises the defense for the first time on appeal). This argument is dismissed.

IV. Subject Matter Jurisdiction

[2] In his second argument, defendant contends that the trial court did not have subject matter jurisdiction over the case. We disagree.

Defendant argues that this case involves a "note and guaranty prepared, executed, delivered, and to be performed in Georgia, between two parties, [who] both, at execution and now, [reside] in Georgia." Defendant further argues that "[i]f Plaintiff has not properly brought the action according to the laws of the contracting state, North Carolina does not have subject matter jurisdiction." According to defendant the applicable Georgia statute reads: "When the fact of suretyship appears on the face of the contract, the creditor shall sue out process against the surety and enter up judgment against him as such." Ga. Code Ann. § 10-7-28 (2007).

To support his argument defendant cites three North Carolina cases: *Land Co. v. Wood*, 40 N.C. App. 133, 252 S.E.2d 546 (1979);

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Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953); and *Hatcher v. McMorine*, 15 N.C. 122 (1883). These cases do not support defendant's argument, but support only the principles of *lex loci* and *lex fori*. Under *lex loci* and *lex fori* contract disputes are governed by the substantive law of the jurisdiction in which the contract was formed and the procedural rules of the jurisdiction trying them. *Land*, 40 N.C. App. at 136-37, 252 S.E.2d at 550. These cases deal only with choice of law analysis and have no bearing on the subject matter jurisdiction of the North Carolina courts. We note that defendant makes no argument concerning jurisdiction based upon an absence of minimum contacts on appeal.

Subject matter jurisdiction is the power to hear and determine cases of the general class to which the action in question belongs. *Cooke v. Faulkner*, 137 N.C. App. 755, 757-58, 529 S.E.2d 512, 514 (2000). "Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). In *Schall v. Jennings*, this Court determined that the Superior Court of Forsyth County had subject matter jurisdiction over a dispute regarding the repayment of a loan even where there were "only out-of-state parties, and the plaintiff presented no evidence that the alleged loan agreement arose in North Carolina." 99 N.C. App. 343, 346, 393 S.E.2d 130, 132 (1990). The court, citing N.C. Gen. Stat. §§ 7A-240 and 243 (1989), held that civil cases in which the amount in controversy exceeds \$10,000.00 and are not otherwise delegated to the district courts are properly brought before the superior courts. *Id.* at 345-46, 393 S.E.2d at 132; *see also Harris*, 84 N.C. App. at 668, 353 S.E.2d at 675 (subject matter jurisdiction over a contract dispute regarding the sale of a horse taking place entirely outside the State of North Carolina is not precluded by non-citizenship of the parties).

The promissory notes were guaranteed by defendant in order to secure funds for the development of real estate in North Carolina. The notes were each in excess of \$10,000.00. Plaintiff's action is a civil matter for the collection of a debt that is not otherwise delegated to the district court division. Under the rationale of *Schall*, the Superior Court of Macon County had jurisdiction to hear and decide this case. This argument is without merit.

V. Application of the Statute of Limitations

[3] In his third argument, defendant contends that "North Carolina lacks subject matter jurisdiction if the action is barred by the applicable statute of limitations of the contracting state." We disagree.

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At the outset, we note that defendant has not challenged the superior court's conclusion of law that defendant was barred from asserting a defense under the statute of limitations. Defendant now attempts to create an issue on appeal by presenting a statute of limitations argument under the guise of his assignment of error questioning subject matter jurisdiction. Defendant has not cited any case law to support the presentation of an issue that was not assigned as error through a back door route.

Even assuming *arguendo* that defendant preserved this argument for appeal, defendant waived all defenses based on the statute of limitations in the guarantees. "Guarantors [sic] waive the benefit or right to assert any statute of limitations affecting Guarantors' [sic] liability hereunder or the enforcement thereof to the extent permitted by law." An explicit waiver of the statute of limitations is effective under the laws of both North Carolina and Georgia. *See Franklin v. Franks*, 205 N.C. 96, 97-98, 170 S.E. 113, 114 (1933) ("The general rule is that a party may either by agreement or conduct estop himself from pleading the statute of limitations as a defense to an obligation." (citation omitted)); *Livaditis v. Am. Cas. Co.*, 160 S.E.2d 449, 452 (Ga. App. 1968) (statutory periods of limitations may be waived by contract); *see also Gore v. Myrtle/Mueller*, 362 N.C. 27, 45, 653 S.E.2d 400, 411-12 (2007) (Parker, C.J., concurring in part/dissenting in part) (quoting *Franklin*). This argument is dismissed.

VI. Conclusion

Defendant waived the defense of lack of personal jurisdiction when he failed to raise it in accordance with North Carolina Rule of Civil Procedure 12(h)(1). The superior court had subject matter jurisdiction over the case since it was a dispute over the payment of a debt, the amount of which was greater than \$10,000.00. Finally, defendant's claims regarding the application of the statute of limitations were not preserved for appellate review.

AFFIRMED.

Judges McGEE and JACKSON concur.

IN RE D.K.

[200 N.C. App. 785 (2009)]

IN THE MATTER OF: D.K., A MINOR CHILD

No. COA09-495

(Filed 3 November 2009)

1. Larceny— motion to dismiss—sufficiency of evidence

The trial court did not err by denying a juvenile's motion to dismiss a petition for larceny for insufficient evidence because the State presented substantial evidence as to each element of larceny.

2. Juveniles— delinquency—adjudication order—ambiguous statement of standard of proof—new trial

A new trial was ordered where the trial court applied conflicting burdens of proof and the actual standard relied upon could not be determined. The trial judge was unavailable to make the required findings on remand as she has already been sworn in as a superior court judge.

Appeal by juvenile-respondent from orders entered 8 October 2008 and 16 October 2008 by Judge Patrice A. Hinnant in Guilford County District Court. Heard in the Court of Appeals 12 October 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Teresa L. Townsend, for the State.

Geeta Kapur, for respondent-appellant.

JACKSON, Judge.

D.K. ("the juvenile") appeals the 8 October 2008 order that adjudicated him delinquent for larceny. For the reasons stated herein, we affirm in part and remand for a new trial.

On 23 April 2008, the juvenile's normal teacher was absent, and he was placed into Ms. Carmen Barrantes's ("Barrantes") classroom. Near the end of the class period, Barrantes asked the students to put their chairs on their desks and wait for her dismissal. At this time she noticed that the juvenile, then eleven years old, had picked up her fisherman flashlight visor ("visor"), worth approximately \$6.00. When she allowed the students to leave, the juvenile ran out of the room. Barrantes ran after him and attempted to retrieve her visor. The juvenile denied having it. Following discussions with the juvenile,

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searches of the juvenile's book bag, and searches of the classroom and nearby hallway, the visor was never found.

A juvenile petition alleging both misdemeanor larceny and misdemeanor possession of stolen goods was filed on 8 July 2008. The trial court held an adjudication hearing on 12 September 2008. The juvenile made motions to dismiss at the conclusion of the State's evidence and again at the conclusion of his own evidence. The trial court denied both motions. On 6 October 2008, the juvenile was adjudicated delinquent for larceny, and the petition for possession of stolen goods was dismissed. At the 9 October 2008 dispositional hearing, the trial court sentenced the juvenile as a Level 1 offender, with disposition being continued for three months. The juvenile appeals.

[1] The juvenile first argues that the trial court erred by denying his motion to dismiss the petition for larceny based upon insufficient evidence. We disagree.

"Generally, a juvenile in an adjudication hearing has '[a]ll rights afforded adult offenders[,] subject to certain exceptions not relevant to the case *sub judice*.'" *In re B.E.*, 186 N.C. App. 656, 658, 652 S.E.2d 344, 345 (2007) (quoting N.C. Gen. Stat. § 7B-2405 (2005)). "Therefore, in order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged." *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985) (citing *State v. Myrick*, 306 N.C. 110, 291 S.E.2d 577 (1982)). "The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact which may be drawn from the evidence." *Id.* (citing *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980)).

According to our Supreme Court, "[t]he essential elements of larceny are that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982) (citing *State v. Booker*, 250 N.C. 272, 108 S.E.2d 426 (1959), *overruled in part on other grounds by State v. Barnes*, 324 N.C. 539, 540, 380 S.E.2d 118, 119 (1989)). Here, the juvenile contends that the State failed to provide substantial evidence as to the second and fourth elements of larceny.

"The fact that the property may have been in defendant's possession and under his control for only an instant is immaterial if his [actions were] such as would constitute a complete severance from

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the possession of the owner.” *State v. Walker*, 6 N.C. App. 740, 743, 171 S.E.2d 91, 93 (1969) (citing *State v. Green*, 81 N.C. 560 (1879); *State v. Jackson*, 65 N.C. 305 (1871)). “ ‘A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away.’ ” *State v. Carswell*, 296 N.C. 101, 103, 249 S.E.2d 427, 428 (1978) (quoting William Blackstone, 4 Commentaries 231). “[T]he accused must not only move the goods, but he must also have them in his possession, or under his control, even if only for an instant.” *Id.* at 104, 249 S.E.2d at 429 (citing *Jackson*, 65 N.C. 305).

“ ‘[T]he intent to permanently deprive an owner of [her] property could be inferred where there was no evidence that the defendant ever intended to return the property, but instead showed a complete lack of concern as to whether the owner ever recovered the property.’ ” *State v. Mann*, 355 N.C. 294, 304, 560 S.E.2d 776, 783 (2002) (quoting *State v. Barts*, 316 N.C. 666, 690, 343 S.E.2d 828, 843-44 (1986), *overruled on other grounds as stated in State v. Jackson*, 340 N.C. 301, 310, 457 S.E.2d 862, 868 (1995)). In addition, “by abandoning property, the thief ‘puts it beyond his power to return the property and shows a total indifference as to whether the owner ever recovers it.’ ” *Id.* (quoting *Barts*, 316 N.C. at 690, 343 S.E.2d at 844).

In the instant case, Barrantes’s testimony places the visor in the juvenile’s possession near the end of the class period. The juvenile does not contest the fact that he did not have permission to hold and look at the visor. Barrantes also stated that the juvenile told her that he had the visor in his hand when he left the classroom but must have dropped it. This evidence allows for a reasonable inference that the visor was in the juvenile’s possession and under his control and that, by dropping it, he put it beyond his power to return the property, showing a total indifference as to whether Barrantes ever recovered it. Therefore, because the State presented substantial evidence as to each element of larceny, the trial court did not err by denying the juvenile’s motion to dismiss.

The juvenile draws our attention to the word “accidentally” in a comment by the trial court when it ruled on his motion to dismiss: “[T]he [c]ourt reached a conclusion that [the juvenile] accidentally dropped it while he was in the [classroom] and somebody else picked it up or that he must have accidentally dropped it when he realized that he was, that the teacher was in pursuit of him.” We note, however, that the word “accidentally” refers to the point at which the

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juvenile lost possession of the visor, not to his mental state at the time he picked up the visor, thereby depriving his teacher of her rightful possession.

[2] Second, the juvenile argues that the trial court erred by stating ambiguously in the adjudication order which standard of proof it utilized, in possible violation of North Carolina General Statutes, sections 7B-2409 and 7B-2411. The State agrees with this contention, as do we.

This Court has addressed this precise issue in two recent decisions.

One of our basic constitutional rights is that the State prove all elements of a criminal charge, including an [sic] juvenile delinquency petition, beyond a reasonable doubt. *In re Vinson*, 298 N.C. 640, 657, 260 S.E.2d 591, 602 (1979). This constitutional right is codified in the North Carolina Juvenile Code, which provides that “[t]he allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt.” N.C. Gen. Stat. § 7B-2409 (2005). Further, “[i]f the court finds that the allegations in the petition have been proved as provided in G.S. 7B-2409, the court *shall* so state.” N.C. Gen. Stat. § 7B-2411 (2005) (emphasis added). Accordingly, this Court has previously held that the provisions of N.C. Gen. Stat. § 7B-2411 “are mandatory and that it is reversible error for a trial court to fail to state affirmatively that an adjudication of delinquency is based upon proof beyond a reasonable doubt.” *In re Walker*, 83 N.C. App. 46, 47, 348 S.E.2d 823, 824 (1986).

In re B.E., 186 N.C. App. at 660-61, 652 S.E.2d at 347. *See also In re C.B.*, 187 N.C. App. 803, 805-06, 654 S.E.2d 21, 23-24 (2007).

Here, the trial court concluded at the close of the adjudicatory proceeding, “That after giving all parties an opportunity to be heard the Court ha [sic], has determined that the uh, juvenile is delinquent for the offense of misdemeanor larceny and misdemeanor possession of stolen property.” Neither this statement nor any surrounding statements indicated what standard of proof the trial court had applied. Subsequently, in its written adjudication order, the trial court found that

the following facts have been proven *beyond a reasonable doubt*:
... 5. After witnesses were sworn and testimony given, the Court will determine that the State has shown *by clear and convincing*

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evidence that the juvenile did commit the act contained in the petition filed July 8, 2008 at 10:21 a.m. in violation of N.C.G.S. 14-72(a), for misdemeanor larceny. The State however did not prove the petition filed July 8, 2008 at 10:21 a.m., in violation of N.C.G.S. 14-71.1, for misdemeanor possession of stolen goods.

(Emphasis added). Because the trial court applied two conflicting burdens of proof, we cannot determine which one it relied upon in making its determination. Ordinarily, “[b]ecause the trial court has already made its determinations as to the credibility of the witnesses and has weighed the evidence, we [would] not require a new hearing.” *In re B.E.*, 186 N.C. App. at 662, 652 S.E.2d at 348. However, the trial judge in this case recently has been appointed to the superior court bench by the governor. As she already has been sworn in to that office, she is unavailable to make the required findings as to standard of proof upon remand. Accordingly, we must order a new trial.

For these reasons, we affirm the trial court’s denial of the juvenile’s motion to dismiss the petition for larceny based upon insufficient evidence. Because the option of remand is unavailable, we also order a new trial.

New trial.

Chief Judge MARTIN and Judge ERVIN concur.

IN THE MATTER OF: W.R.A., MINOR CHILD

No. COA09-592

(Filed 3 November 2009)

Adoption— denial of motion for appropriate relief—statutory procedure for challenging final order of adoption

The trial court did not err by dismissing appellants’ motion for appropriate relief under N.C.G.S. §§ 15A-1415(b)(3) and 15A-1443 because appellants failed to properly follow the statutory procedure for challenging a final order of adoption set forth in Chapter 48.

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Appeal by respondent-mother and paternal-relative interveners from order entered 28 January 2009 by Judge John W. Davis in Franklin County District Court. Heard in the Court of Appeals 7 September 2009.

Batton & Guin, by David R. Guin, for Franklin County Department of Social Services petitioner appellee.

DeCillis and Turrentine, PLLC, by Karlene S. Turrentine, for respondent-mother and paternal-relative appellants.

HUNTER, JR., Robert N., Judge.

Respondent-mother (“Violet”),¹ and W.R.A.’s paternal great-aunt and -uncle (the “Baileys”)² appeal the trial court’s order dismissing their motion for appropriate relief under N.C. Gen. Stat. §§ 15A-1415 *et seq.* (2007). While appellants present several substantive arguments in support of reversing the trial court’s order, we affirm based on appellant’s failure to properly follow the statutory procedure for challenging a final order of adoption.

Facts

Violet and W.R.A. (“Annie”) both tested positive for cocaine and marijuana when Annie was born on 8 June 2007. As a result, Franklin County Department of Social Services (“DSS”) filed a petition alleging that Annie was neglected and dependent the same day. DSS was granted non-secure custody, and Annie was initially placed with her maternal grandmother after her birth. However, for reasons not in the record, Annie was placed in a foster home less than two weeks later.

After being in the foster home for several weeks, Annie was placed with a potential adoptive foster family, the Smiths, and DSS’s permanent plan for Annie was changed to adoption. Annie’s biological father signed a relinquishment of his parental rights immediately subsequent to confirmation of paternity in September 2007 conditioned on Annie being adopted by the Smiths.

On 15 November 2007, four of Annie’s paternal relatives (“intervenor(s)”) ³ filed a motion to intervene and a motion for placement or

1. Pseudonyms are used throughout this opinion to ease reading and protect the anonymity of the parties.

2. Violet and the Baileys will collectively be referred to as “appellants.”

3. Initially the relatives consisted of two couples, both paternal great-aunts and -uncles. One of the couples withdrew prior to this appeal, leaving only one couple referred to here as the Baileys.

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custody of Annie. On 18 January 2008, the trial court entered an order keeping Annie in DSS custody without ruling on the motion to intervene. A DSS court summary following the 18 January 2008 hearing contains an annotation stating:

Since the last court date the mother has signed relinquishments and then revoked the relinquishments. The mother has then stated on two occasions that she wanted to sign new relinquishments.

On 7 February 2008, DSS filed a motion to terminate Violet's parental rights. As grounds for termination, DSS alleged that: (1) Annie was neglected; (2) Violet was incapable of providing proper care or supervision of Annie; and (3) Violet's incapability would continue in the foreseeable future due to her fifteen-year history of substance abuse and inpatient and outpatient treatment for substance abuse. On 20 June 2008, DSS amended the motion to terminate Violet's parental rights, and added the allegation that Violet had willfully left Annie in foster care for more than twelve months without making significant progress toward completing her case plan.

A hearing was held on 25 July 2008 to terminate Violet's parental rights, and the matter came on before Judge Randolph Baskerville. At the start of the hearing, counsel for DSS advised the court:

It's obvious we are not going to be able to reach that for hearing. We have requested that . . . the mother of [the] juvenile submit to a random drug screen, and have provided the services necessary for that to happen. That has been a part of her family services case plan, which she has been ordered to comply with previously in this court. And she has refused to do that today. So before she leaves—she has to be in Wake County to begin serving a period of incarceration which she was ordered to serve on weekends. But we would like her to submit a random urine sample today. And we have a probation officer here with a sample kit available, and so we would ask the court to require [Violet] to provide a sample.

In response, the court ordered Violet's attorney to inform her that "she needs to give the sample today. In the next minute." Violet was then allowed to address the court, and informed Judge Baskerville of her previous compliance with random drug testing. Violet furthermore added: "But I am not on probation and I do not feel that is fair to me to have to be watched like I am on probation." The court again ordered an immediate drug test; however, Violet refused to provide a urine sample. The court then asked Violet's attorney to talk to her "[b]efore I put her in jail. Right now."

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After speaking with her attorney, Violet signed an irrevocable relinquishment of her parental rights instead of complying with the trial court's order. The second relinquishment was irrevocable given that it was Violet's second relinquishment in favor of "placement [of Annie] with the same adoptive parent selected by [DSS] and agreed upon by [Violet.]" The relinquishment was conditioned on Annie being adopted by the Smiths.

On 15 August 2008, the Smiths filed a petition to adopt Annie, which was granted on 2 September 2008. On 5 November 2008, appellants⁴ filed a motion for appropriate relief under N.C. Gen. Stat. § 15A-1415 *et seq.*, and moved to overturn the 2 September 2008 Decree of Adoption on the grounds that: (1) Violet signed a second relinquishment of her parental rights under duress; and (2) the Baileys did not receive proper notice of the termination of parental rights or adoption hearings.

The motion was heard on 10 December 2008, and the trial court entered an order dismissing the motion for appropriate relief for lack of subject matter jurisdiction on 27 January 2009. Appellants now seek review of the trial court's order.

Analysis

Appellants argue that the trial court erred in dismissing their motion for appropriate relief and the respective duress and notice arguments contained therein. We disagree.

A motion to terminate parental rights is a civil cause of action, and the procedures are found in Chapter 7B of our General Statutes and supplemented by the North Carolina Rules of Civil Procedure when necessary. *In re B.L.H. & Z.L.H.*, 190 N.C. App. 142, 146, 660 S.E.2d 255, 257, *aff'd*, 362 N.C. 674, 669 S.E.2d 320 (2008); *see In re S.D.W. & H.E.W.*, 187 N.C. App. 416, 653 S.E.2d 429 (2007). After the entry of a final order of adoption by the district court in North Carolina, the district court no longer retains jurisdiction over matters pending under Chapter 7B. N.C. Gen. Stat. § 48-2-102(b) (2007). Thus, the sole legal procedure established to review an adoption decree entered by the trial court is under Chapter 48. N.C. Gen. Stat. § 48-2-607(a) (2007).⁵

4. After the trial court denied the motion to intervene, one of the couples did not further seek to be heard in this case. Therefore, Violet and the Baileys are the only appellants.

5. Notwithstanding the provisions outlined in subsections (b) and (c) of G.S. § 48-2-607, "after the final order of adoption is entered, no party to an adoption pro-

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Here, appellants filed a motion for appropriate relief based on N.C. Gen. Stat. §§ 15A-1415(b)(3),⁶ -1443⁷ (2007), which are sections of the Criminal Procedure Act. *State v. Handy*, 326 N.C. 532, 535, 391 S.E.2d 159, 160-61 (1990) (“A motion for appropriate relief is a *post verdict* motion . . . made to correct errors occurring prior to, during, and after a criminal trial.”). Given that appellants failed to follow the adoption procedures delineated in Chapter 48, the district court properly found that it lacked subject matter jurisdiction to hear their purported motion for appropriate relief, because it had already entered the final order of adoption in this case.

Though it appears that Violet could have moved the trial court to void the adoption decree pursuant to N.C. Gen. Stat. § 48-2-607(b)⁸ based on her claim of duress, she failed to do so. Accordingly, we affirm the order of the trial court.

Affirmed.

Judges GEER and BEASLEY concur.

ceeding nor anyone claiming under such a party may question the validity of the adoption because of any defect or irregularity, jurisdictional or otherwise, in the proceeding, but shall be fully bound by the order.” N.C. Gen. Stat. § 48-2-607(a).

6. “The following are the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment: . . . [t]he conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.” N.C. Gen. Stat. § 15A-1415(b)(3) (emphasis added).

7. This statute codifies “existing definitions of prejudice in North Carolina[,]” “the standard of prejudice with regard to violation of the defendant’s rights under the Constitution[,]” and “the ‘invited error rule.’” N.C. Gen. Stat. § 15A-1443 Official Comment (citations omitted).

8. “A parent or guardian whose consent or relinquishment was obtained by fraud or duress may, within six months of the time the fraud or duress is or ought reasonably to have been discovered, move to have the decree of adoption set aside and the consent declared void.” N.C. Gen. Stat. § 48-2-607(c).

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Preservation of issues—summary judgment properly denied on other issues—There was no need to address plaintiffs' remaining cross-assignments of error denying plaintiffs' motion for summary judgment on the alternative theories of estoppel and lack of standing because the trial court did not err by denying summary judgment to the Estate. **Woods v. Mangum, 1.**

Preservation of issues—theory not raised at trial—failure to cite authority—failure to apply facts from record—The Bissettes could not argue on appeal a theory other than that raised before the trial court. Even had it been raised below, the Bissettes cited no authority supporting their contention and, furthermore, they did not apply facts from the record to support the case law cited on their further argument concerning affirmative defenses. **Moss Creek Homeowners Assoc. v. Bisette, 356.**

Records and briefs—protecting identity of juveniles—Appellate records and briefs are public records and the State and all defendants are cautioned to guard juveniles' identities by not referring to juveniles or those related to them by name. **State v. Horton, 74.**

Rule 2—plain error review—A Confrontation Clause issue involving DNA test results was heard under Appellate Rule 2 but only under the plain error standard. Defendant did not object appropriately at trial and did not properly preserve the claim of plain error. **State v. Mobley, 570.**

Standing—not assigned as error—issue dismissed—An issue involving standing that was not assigned as error was dismissed. **Livesay v. Carolina First Bank, 306.**

APPEAL AND ERROR—Continued

Timeliness—juvenile—motion to suppress denied—A juvenile's notice of appeal was not timely where it was filed 85 days after entry of an order denying a motion to suppress his statement to officers. N.C.G.S. § 7B-2602 refers to the order which is being appealed and would have allowed written notice of appeal within 70 days since no disposition was made within 60 days. However, the appeal was under a grant of *certiorari*. **In re M.L.T.H., 476.**

ATTORNEYS

Fees—restrictive covenants—not amended—statutory authority not included—An award of attorney fees without statutory authority was reversed where the fees were incurred in an action arising from the subdivision and sale of a lot contrary to restrictive covenants. The Declaration of Covenants was not amended to incorporate statutory revisions authorizing the recovery of attorney fees in an action to enforce restrictive covenants. **Moss Creek Homeowners Assoc. v. Bissette, 356.**

BANKS AND BANKING

Right of survivorship—intent—joint checking account—The trial court erred in a breach of fiduciary duty and negligence case by determining that a joint checking account did not incorporate a right of survivorship because the clear intent of Doris King's and Kimzie Cowart's Customer Access Agreements and the subsequent agreement between Doris King and Cowart to enter into a joint checking account was to incorporate a right of survivorship. **Albert v. Cowart, 57.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Grandparents—standing—Respondent maternal grandmother's appeal from the trial court's adjudication and disposition orders awarding physical and legal custody of a minor child to his paternal grandparents was dismissed for lack of standing because: (1) respondent is neither a parent nor an appointed guardian of the child under N.C.G.S. § 7B-1002(4); and (2) respondent failed to demonstrate that she was the non-prevailing party since the trial court granted her requests to not award permanent custody to the paternal grandparents and grant visitation privileges to respondent. **In re T.B., 739.**

CITIES AND TOWNS

Dedication to public—common law offer and acceptance applies—The common law principles of offer and acceptance apply to dedications because North Carolina does not have statutory guidelines for dedications to the public. **Metcalf v. Black Dog Realty, LLC, 619.**

Express dedication—offer and acceptance—courthouse property—The trial court erred by granting summary judgment in favor of plaintiffs based on an offer of 31 December 1900 and acceptance of that offer as creating an express dedication of the courthouse property. **Metcalf v. Black Dog Realty, LLC, 619.**

Express public dedication—common law rules—The trial court erred by granting summary judgment in favor of plaintiffs based on the language of a deed

CITIES AND TOWNS—Continued

as grounds for an express public dedication, and the trial court should have entered summary judgment in favor of defendants on this issue. **Metcalf v. Black Dog Realty, LLC, 619.**

Implicit dedication—intent of owner—The trial court erred by granting summary judgment for plaintiffs and not for defendants on the issue of implied dedication. There was no evidence that the owner ever had any intent to dedicate the courthouse property for use as an independent public park and even if plaintiffs' allegations that the courthouse property has been used for public purposes are taken as true, a county is not bound to continue to use real property in that manner for any particular period of time. **Metcalf v. Black Dog Realty, LLC, 619.**

CIVIL PROCEDURE

Dismissal—underlying finding not challenged—No error was found in the dismissal of a claim for breach of fiduciary duty where the trial court's finding that a pleading was not sufficient to show a right to relief was not challenged. **Moss Creek Homeowners Assoc. v. Bisette, 356.**

Rule 60—excusable neglect—not notifying court of change of address—domestic abuse—The trial court properly concluded that defendant Lisa Elliott's failure to notify the court of a change of address was excusable neglect under Rule 60(b)(1), and the trial court did not abuse its discretion by vacating a judgment against defendant, in light of plaintiff David Elliot's documented history of domestic abuse and plaintiffs' violation of Rule 5 in not serving requests for admissions and subsequent pleadings on all defendants. **Elliott v. Elliott, 259.**

CIVIL RIGHTS

§ 1983—Medicaid payments withheld—statute of limitations—accrual of claim—Summary judgment for defendant based on the statute of limitations on a 42 U.S.C. § 1983 claim arising from Medicaid payments claims was reversed. There was a genuine issue of material fact as to when plaintiffs knew or reasonably should have known that the investigation into the Medicaid payments was closed. **Housecalls Home Health Care, Inc. v. State, 66.**

COMPROMISE AND SETTLEMENT

Binding settlement agreement—sufficiency of evidence—The trial court did not err by concluding as a matter of law based on competent record evidence that the parties had entered into a valid and binding settlement agreement of all issues. **Powell v. City of Newton, 342.**

Enforcement of settlement agreement—statute of frauds—The trial court did not err by enforcing a settlement agreement because the essential terms of the contract were reduced to writing. Under judicial estoppel, plaintiff was not permitted to later assert in open court in the presence of a trial judge that he had not agreed to surrender a quitclaim deed to the disputed property in exchange for \$40,000. **Powell v. City of Newton, 342.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Motion to suppress—statements at hospital—The trial court did not err in a second-degree murder case by denying defendant's motion to suppress his state-

CONFESSIONS AND INCRIMINATING STATEMENTS

ment to police at a hospital. Defendant was not subjected to a custodial interrogation since the atmosphere and physical surroundings during the questioning manifested a lack of restraint or compulsion and any restraint on defendant's movement was due to his medical treatment and not the actions of the police officers. **State v. Allen, 709.**

Motion to suppress—statements at police station—The trial court did not err in a second-degree murder case by denying defendant's motion to suppress his statement because merely stating the charges brought against a defendant is not an interrogation and defendant initiated the communication with the detective. **State v. Allen, 709.**

Motion to suppress—voluntariness—new hearing granted—The trial court erred in a first-degree murder case by denying defendant's motion to suppress statements he made to his wife while he was incarcerated, which he contends were not voluntary. The trial court did not provide a rationale for its ruling at the suppression hearing, and did not make written conclusions, and the case is remanded to the trial court for a new suppression hearing. **State v. Rollins, 105.**

Pre-Miranda statements—not solicited—The trial court properly denied defendant's motion to suppress his pre-Miranda statements to officers where there was competent evidence for the court to find and conclude that defendant's comments were not solicited and were not products of interrogation by police. **State v. Stover, 506.**

CONSPIRACY

Civil—two allegations—prior partial summary judgment—12(b)(6) dismissal—The trial court correctly granted defendants' Rule 12(b)(6) motion to dismiss a civil conspiracy claim where the conspiracy allegations were raised in two paragraphs of the complaint and a prior partial summary judgment for defendants had disposed of the first allegation, which contained the only factual allegation of conspiracy. **Elliott v. Elliot, 259.**

CONSTITUTIONAL LAW

Double Jeopardy—convictions for possession of a controlled substance and possession of a controlled substance with intent to sell or deliver—Defendant's right to be free from double punishment was not impaired based on her convictions for both felony possession of marijuana and felony possession with intent to sell or deliver marijuana. **State v. Springs, 288.**

Due process—pre-indictment delay—prejudice—allegation not specific—Defendant did not show a violation of his due process rights from a pre-indictment delay where he asserted only that the length of the delay in indicting him created a reasonable possibility of prejudice. **State v. Graham, 204.**

Effective assistance of counsel—delay in indictment and appointing counsel—Defendant's ineffective assistance of counsel argument was better addressed as a claim of prejudice from preindictment delay where he argued that delaying indictment prevented the appointment of counsel which led to hardship in preparing his defense. **State v. Graham, 204.**

CONSTITUTIONAL LAW—Continued

Effective assistance of counsel—failure to object—A defendant did not receive ineffective assistance of counsel based on his counsel's failure to object to the introduction of all evidence obtained pursuant to defendant's detention because the failure to object to admissible evidence does not constitute error. **State v. Mewborn, 731.**

Effective assistance of counsel—speedy trial motion—There was no effective assistance of counsel violation where defendant argued that his counsel's failure to make a speedy trial motion was deficient performance, but defendant was represented by counsel when his *pro se* motions to dismiss were heard. Defendant has not shown that counsel's failure to again move for dismissal on speedy trial grounds was prejudicial. **State v. Graham, 204.**

Ex post facto—satellite-based monitoring—The required enrollment of defendant in a satellite-based monitoring system did not violate the *ex post facto* clauses of the state and federal constitutions. **State v. Stines, 193.**

Ex post facto—satellite-based monitoring—new requirement—Mandatory satellite-based monitoring (SBM) of a defendant convicted of indecent liberties did not violate the *ex post facto* clause of the United States Constitution where the requirement did not exist when the offense was committed. Issues regarding implementation of the SBM policy were not raised by either party. **State v. Morrow, 123.**

First Amendment—right of access—search warrants—A newspaper and a television station did not have a First Amendment right of access to sealed search warrants and affidavits. Search warrants and related documents fail the first prong of the test in *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (1989). **In re Search Warrants of Cooper, 180.**

North Carolina—open courts—sealed documents—The trial court properly applied the open courts provision of the North Carolina Constitution to the issue of access to sealed search warrants and affidavits. The qualified right of public access to criminal records is outweighed by compelling, countervailing governmental interests. **In re Search Warrants of Cooper, 180.**

North Carolina—separation of powers—making rules of practice and procedure in district and superior courts—The superior court erred by concluding that N.C.G.S. §§ 20-38.6(f) and 20-38.7(a) violated the separation of powers provision of the North Carolina Constitution. The challenged statutes are within the General Assembly's constitutional power to make rules of practice and procedure in the district and superior courts, and to provide a system of appeals between those courts. **State v. Mangino, 430.**

Ordinance—loitering for the purpose of drug activity—overbroad—An ordinance was unconstitutionally overbroad where it prohibited loitering in a public place under circumstances manifesting the purpose of violating the Controlled Substances Act. The ordinance did not require proof of intent and criminalizes constitutionally permissible conduct. **State v. Mello, 561.**

Ordinance—loitering for the purpose of drug activity—vagueness—An ordinance which prohibited loitering in such a manner as to raise a reasonable suspicion of drug activity was unconstitutionally vague because it did not clarify the behavior the provision governs. Arresting a person on suspicion alone is also unconstitutional. **State v. Mello, 561.**

CONSTITUTIONAL LAW—Continued

Right to confrontation—chemical analysis testimony—harmless error beyond reasonable doubt—overwhelming evidence of guilt—Although the admission of an expert's testimony regarding the weight of cocaine found at defendant's residence violated his Sixth Amendment right to confrontation since the testifying expert did not personally perform the analysis and generate the lab report, the error was harmless beyond a reasonable doubt. Defendant's own statement, with the unchallenged testimony of law enforcement officers, established beyond a reasonable doubt that a reasonable jury would have found defendant guilty of trafficking in cocaine even without the expert's testimony. **State v. Galindo, 410.**

Right to confrontation—DNA tests—The admission of testimony from a lab analyst about DNA tests performed by other analysts did not violate the Confrontation Clause where the DNA tests were used as a basis for the witness's expert opinion and the witness independently reviewed and confirmed the results. **State v. Mobley, 570.**

Right to counsel—forfeiture—obstructing and delaying proceedings—substitute counsel denied—The trial court did not abuse its discretion by denying defendant's motion for substitute counsel in an indecent liberties prosecution. Although the trial court did not make the N.C.G.S. § 15A-1242 inquiry, defendant forfeited his right to counsel by willfully obstructing and delaying proceedings. Forfeiture does not require a knowing and voluntary waiver. **State v. Boyd, 97.**

Right to free public education—access to alternative education—The trial court did not err by allowing defendants' motion to dismiss a declaratory judgment action under N.C.G.S. § 1A-1, Rule 12(b)(6) for defendants' alleged failure to provide an alternative education program for a student given a long-term suspension because the disposition of students who have been expelled or given long-term suspensions is a decision involving the administration of the public schools which is best left to the Legislature. **King v. Beaufort Cnty. Bd. of Educ., 368; Hardy v. Beaufort Cnty. Bd. of Educ., 403.**

Void for vagueness—not raised at trial—A void for vagueness argument not raised at trial was dismissed on appeal. **State v. Morrow, 123.**

CONTEMPT

Attorney fees—no statutory authority—Outside of family law, statutory authority is required for enforcement of contempt, and the trial court erred here by awarding attorney fees incurred in enforcing contempt orders. **Moss Creek Homeowners Assoc. v. Bisette, 356.**

CONTRACTS

Breach of contract—summary judgment—There were numerous issues of fact and law that precluded summary judgment on a breach of contract claim. **Carcano v. JBSS, LLC, 162.**

Declaratory judgment—cash investment in real estate development—interpretation of contract terms—In a declaratory judgment action in which the Ridingers invested \$1,000,000 with plaintiff (Turchin) in return for 40 acres in

CONTRACTS—Continued

a new development and only 30 acres were transferred, the trial court properly required the payment of \$250,000 to the Ridingers. The trial court correctly interpreted the contract between the parties; investing cash in a business does not guarantee a profit for the investor. **Eagles Nest v. Ridinger, 587.**

CORPORATIONS

Piercing corporate veil—instrumentality rule—The trial court erred by concluding that plaintiff's complaint failed to state a claim for piercing defendant's corporate veil because plaintiff's pleading asserted facts that, if proven to be true, would establish all the elements for piercing the corporate veil under the instrumentality rule. **Fischer Inv. Capital, Inc. v. Catawba Dev. Corp., 644.**

COSTS

Attorney fees—fifteen percent cap—By awarding \$92,208.76 in attorney fees on a \$421,680.67 verdict, the trial court did not violate the fifteen percent cap mandated by N.C.G.S. § 6-21.2 because the balance of the debt collected in both the current action and the reasonably related Kansas bankruptcy proceeding was \$724,315.67, making the trial court's award well below the statutory ceiling. **Telerent Leasing Corp. v. Boaziz, 761.**

COUNTIES

Bonds—professional baseball stadium—The County's use of the proceeds of a bond issue to acquire land for a professional baseball stadium complied with N.C.G.S. § 159-48(c)(4b). Since the County is authorized to issue bonds for the construction of stadiums and arenas, the purchase of land for that use is a county corporate purpose under the statute. **Reese v. Mecklenburg Cnty., 491.**

Bonds—public parks—funds restricted—particular property not restricted—Proposed ballot language for public park bonds was not intended to preclude use of property as a professional baseball stadium and there was not a substantial deviation from the purpose for which the bonds were proposed. **Reese v. Mecklenburg Cnty., 491.**

Professional baseball club—lease—notice of terms—The County properly published notice of the terms of a lease with a professional baseball club where plaintiff argued that the transaction of which notice was given substantially differed from the final version. The final version did not alter any of the material obligations between the parties. **Reese v. Mecklenburg Cnty., 491.**

Professional baseball stadium—acquisition and use of land—The County's statutory authority to acquire and use land includes the operation of a proprietary professional baseball stadium. The fact that the County chose to achieve the goal of erecting a downtown baseball stadium by leasing the land and having a private party shoulder the bulk of the expense for the stadium does not mean that the transaction fails to serve a public purpose. **Reese v. Mecklenburg Cnty., 491.**

Professional baseball stadium—leases—statutory authority—Leases of property by a county for a professional baseball stadium were not voided based

COUNTIES—Continued

on the argument that N.C.G.S. §§ 160A-266 and -272 do not expressly allow the leasing of real property. **Reese v. Mecklenburg Cnty., 491.**

CRIMINAL LAW

Instructions—flight—The trial court did not err in a second-degree murder case by instructing the jury on flight because the evidence was sufficient to support the theory that defendant fled the scene to avoid apprehension. Even assuming *arguendo* there was insufficient evidence to support a flight instruction, defendant failed to show prejudice in light of the overwhelming evidence presented at trial that defendant was the perpetrator. **State v. Allen, 709.**

Instructions—lapsus linguae—A *lapsus linguae* instructing the jury on returning a not guilty verdict on all charges was not plain error. The trial court did not commit plain error by instructing the jury on finding defendant guilty or not guilty of the charges against him because the jury would not have reached a different result but for the *lapsus linguae* when considering all the instructions in the context of the entire charge. **State v. Coleman, 696.**

Lost evidence—motion for sanctions—There was no abuse of discretion in the trial court denying a first-degree murder defendant's motion for sanctions after the State lost defendant's impounded car, and in allowing the State to admit evidence about soil taken from the car. There was no showing of bad faith, defendant had access to the soil samples, he presented evidence from his own expert, and he was able to tell the jury that the police department had lost his car. **State v. Graham, 204.**

Pretrial publicity—continuance denied—The trial court did not err by denying defendant's motion for a continuance due to pretrial publicity where defendant neither presented evidence to support the motion nor asked the trial court to take judicial notice of any publicity, and all of the jurors stated that they had not heard about the case or could put aside what they had heard or read. **State v. Wright, 578.**

Prosecutor's arguments—failure to present mental health evidence or mental health defense—failure to present accident defense—The trial court did not err in a felonious child abuse inflicting serious bodily injury and second-degree murder case by overruling defendant's objections to the prosecutor's closing arguments. The prosecutor commented on the lack of evidence supporting the forecast of evidence by defense counsel in the opening statement and did not comment on defendant's failure to testify. **State v. Anderson, 216.**

Prosecutor's arguments—not a comment on failure to testify—The trial court did not err in a first-degree murder prosecution by not intervening *ex mero motu* to exclude comments by the prosecutor during closing arguments which defendant contended referred to his failure to testify. The remarks were permissible comments on defendant's failure to produce witnesses or evidence to contradict the State's evidence. **State v. Graham, 204.**

Satellite-based monitoring—conviction predated effective date of satellite-based monitoring statutes—The trial court did not err in an indecent liberties case by ordering that defendant be enrolled in a lifetime satellite-based monitoring (SBM) program even though the date upon which he committed the

CRIMINAL LAW—Continued

offense for which he was convicted predated the effective date of the SBM statutes. Retroactive application of the SBM provisions does not violate the *ex post facto* clauses of the state and federal constitutions and the record was devoid of any indication that the State ever agreed to forego seeking to have defendant enrolled in the SBM program. **State v. Vogt, 664.**

DAMAGES AND REMEDIES

Punitive damages—motion for judgment notwithstanding the verdict—The trial court did not err in a negligence and breach of implied warranty of merchantability case arising from a restaurant serving a customer cleaning solution by denying defendant's motion for JNOV on the issue of punitive damages. The evidence was sufficient to permit the jury to reasonably conclude that an employee's insistence on following company policy and completing a report before determining what plaintiff had ingested and the appropriate first aid was related to plaintiff's injuries. Plaintiff's testimony was competent to address whether her emotional injuries were related to the willful and wanton conduct. **Everhart v. O'Charley's Inc., 142.**

Punitive damages—motion for new trial—The trial court did not err by denying defendant's motion for a new trial because the facts support the jury's punitive damages award in light of the factors set out in N.C.G.S. § 1D-35(2) and in *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996). **Everhart v. O'Charley's Inc., 142.**

Punitive damages—summary judgment—breach of contract—The trial court did not err by granting summary judgment in favor of defendants on the issue of punitive damages under N.C.G.S. § 1D-15. Punitive damages are not awarded against a person solely for breach of contract. **Carcano v. JBSS, LLC, 162.**

DECLARATORY JUDGMENTS

Motion to dismiss—sufficiency of evidence—The trial court did not err by granting defendants' Rule 12(b)(6) motion to dismiss plaintiff's declaratory judgment action requesting the production of certain records under N.C.G.S. § 132-9(a) where defendants reviewed their records, produced all responsive public records, and requested that plaintiff provide a list of specific information they believed to be missing. **State Employees Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer, 722.**

Standing—action to quiet title—The trial court did not err in a declaratory judgment action regarding the use of public property by denying defendant company's motion to dismiss based upon plaintiffs' lack of standing. To the extent that this is an action to quiet title, the pleadings have raised an actual controversy which is a proper subject for an action under the Uniform Declaratory Judgment Act. **Metcalf v. Black Dog Realty, LLC, 619.**

Standing—allegation of special damages not required—Plaintiffs had standing to file a declaratory judgment action challenging defendants' rezoning of property because the Declaratory Judgment Act does not require a party seeking relief to be an "aggrieved" person or to otherwise allege special damages. **Musi v. Town of Shallotte, 379.**

DECLARATORY JUDGMENTS—Continued

Summary judgment—written findings of fact and conclusions of law not required—The trial court did not err in a declaratory judgment action regarding the use of public property by denying defendants' motion for written findings of fact and conclusions of law in an order granting summary judgment. There were no issues of fact that were material to the resolution of the legal issues and the trial court was not required to make conclusions of law in the order. **Metcalf v. Black Dog Realty, LLC, 619.**

DEEDS

Restrictive covenants—interpretation—unambiguous contract—The trial court did not err by awarding summary judgment against the Bissettes on the issue of whether restrictive covenants were ambiguous where the covenants forbade the subdivision or reduction of size of any lot and the Bissettes undisputedly reduced the size of a lot. Although the Bissettes contended that there was an ambiguity in the covenants because covenants must be interpreted through the statutes and subdivision regulations, the acceptance of a deed incorporating covenants creates a contract, and contracts must be construed as written if plain and unambiguous. **Moss Creek Homeowners Assoc. v. Bissette, 356.**

DIVORCE

Equitable distribution—reconciliation prior to death extinguished claim—The trial court did not err by dismissing defendant executor's equitable distribution claim where the trial court properly concluded based on the undisputed objective evidence that the Casellas had resumed marital relations prior to the husband's death. An equitable distribution claim is extinguished by operation of N.C.G.S. § 50-20(1)(1) in these circumstances. **Casella v. Alden, 24.**

ELECTIONS

Ballot requirements—not unconstitutional—compelling state interests—A statute concerning the requirements for a political party to be on the ballot in North Carolina implicated rights under the North Carolina Constitution as well as fundamental rights protected by parallel provisions in the federal constitution. There is no reason to determine that the State of North Carolina's interest in regulating the administration of its elections under the North Carolina Constitution is less compelling than the interest all states have in regulating the administration of elections under the federal Constitution. **Libertarian Party of N.C. v. State of N.C., 323.**

Ballot requirements—not unconstitutional—narrowly tailored state interests—The trial court did not err by holding constitutional a statute requiring a new political party to present a petition with registered voter signatures equaling two percent of those who voted in the last gubernatorial election to gain access to the ballot. Although appellants argued that the petition requirement is not narrowly tailored to meet the State's compelling interest, its unconstitutionality was not shown clearly, positively, and unmistakably beyond a reasonable doubt. **Libertarian Party of N.C. v. State of N.C., 323.**

EMINENT DOMAIN

Damages trial—instructions—use of land—The trial court in an eminent domain proceeding did not improperly focus the jury on one use of the property and take away the jury's fact finding function of determining the highest and best use of the property. **Progress Energy Carolinas, Inc. v. Strickland, 600.**

Law of the case—power line interfering with airstrip—second appeal—The law of the case doctrine applied in a condemnation action involving a power line that affected two airstrips, and the trial court properly instructed the jury using specific language from the prior appellate opinion. **Progress Energy Carolinas, Inc. v. Strickland, 600.**

EVIDENCE

Affidavit—credibility—The trial court did not err in an action to clear title to property by granting summary judgment in favor of plaintiffs even though the Estate contends Dr. Woods' affidavit lacked credibility because: (1) there was no evidence of untruthfulness or a personal history of misconduct; (2) the affidavits did not seem inherently incredible, the circumstances themselves are not suspect, and the Estate did not show any need for cross-examination; and (3) any credibility concerning Dr. Woods' affidavit was latent in nature, which was insufficient in itself to deny summary judgment. **Woods v. Mangum, 1.**

Character—obtaining property by false pretenses—campaign finance activities—probative of fact other than character—The trial court did not abuse its discretion in a prosecution for obtaining property by false pretenses by admitting testimony about campaign finance activities that was necessary to show how some of the charges were initiated and was probative of a fact other than the character of defendant. **State v. Wright, 578.**

Credibility—improper opinion—The trial court erred in a controlled substances case by improperly expressing an opinion that tended to discredit defendant's defense theory. The trial court's statements unintentionally suggested that it had already assessed the credibility of defendant's evidence and found it lacking. The remark was prejudicial because it went to the heart of the theory of defense. **State v. Springs, 288.**

Credibility of victim—admission not plain error—There was no plain error in an indecent liberties prosecution in the admission of testimony from a social worker that the victim's disclosure was plausible and consistent. Given the other evidence, it was unlikely that the jury would have reached a different result without this testimony. **State v. Boyd, 97.**

Defendant's prior crimes or bad acts—assaults—admissible—Evidence of defendant's prior assaults against the victim was probative of defendant's motive, malice, hatred, ill-will, and intent, and was admissible. **State v. Graham, 204.**

Demonstration—shaken baby syndrome—The trial court did not err in a felonious child abuse inflicting serious bodily injury and second-degree murder case by admitting a shaken baby syndrome demonstration because the demonstration was relevant to defendant's intent to harm the child, was not misleading to the jury, and was not unfairly prejudicial. **State v. Anderson, 216.**

Exclusion of exhibits—summary judgment hearing—The trial court did not abuse its discretion by excluding certain exhibits from evidence at a summary

EVIDENCE—Continued

judgment hearing in a declaratory judgment action challenging rezoning. **Musi v. Town of Shallotte, 379.**

Hearsay—failure to show prejudice—Respondent failed to demonstrate prejudice from the trial court's admission of alleged hearsay testimony over respondent's objection. **In re F.G.J., M.G.J., 681.**

Hearsay—trooper's account of witness's statements—admissible—corroboration—In a second-degree murder prosecution arising from an auto collision, a Highway Patrol Trooper's testimony relating a passenger's statements about defendant (the driver) being drunk was properly admitted for corroboration because it strengthened the passenger's testimony. Furthermore, defendant could not demonstrate prejudice. **State v. Tellez, 517.**

Prior crimes or bad acts—assault—probative and not prejudicial—There was no abuse of discretion in admitting evidence of a prior assault against the victim in a first-degree murder prosecution. The prior assault was highly probative and the evidence against defendant was overwhelming. **State v. Graham, 204.**

Punitive damages—evidence of prior lawsuit—opened door—The trial court did not err during the punitive damages phase of a negligence trial by admitting evidence of prior allegations that a customer had been served bleach in another of defendant's restaurants. Defendant "opened the door" to such evidence. **Everhart v. O'Charley's Inc., 142.**

Subsequent crime—admitted for intent and *modus operandi*—There was no error in a rape prosecution in admitting evidence of a subsequent rape under N.C.G.S. § 8C-1, Rule 404(b) where the subsequent rape was nearly two-and-one-half years later but was admitted in part to show intent and *modus operandi*. Remoteness in time was thus less important and the subsequent rape was sufficiently proximate. **State v. Mobley, 570.**

Testimony of counselor—credibility of victim—There was prejudicial error in an indecent liberties prosecution where an expert in the treatment of abused children, who was also the victim's counselor, testified that the credibility of children is enhanced when they provide details such as those provided by this victim. **State v. Horton, 74.**

Testimony of counselor—opinion that victim abused—There was prejudicial error in an indecent liberties prosecution where the victim's counselor testified that the victim had more likely than not been sexually abused. This exceeds the permissible opinion testimony that a child exhibits characteristics consistent with abused children. **State v. Horton, 74.**

Testimony of counselor—substantially corroborative—There was no prejudicial error in an indecent liberties prosecution in the admission of hearsay testimony from the victim's counselor. That testimony provided new information, but tended to strengthen the child's testimony. Substantially corroborative testimony is not rendered incompetent by the fact that there is some variation. **State v. Horton, 74.**

FALSE PRETENSE

Bank loan—availability of grant funds—The trial court did not err by not dismissing one charge of obtaining property by false pretenses with a loan where there was substantial evidence for the jury to infer that the bank relied on a letter falsely representing that grant funds were available in disbursing funds for the loan. **State v. Wright, 578.**

FIREARMS AND OTHER WEAPONS

Possession of firearm by felon—carrying concealed weapon—motion to dismiss—sufficiency of evidence—constructive possession—The trial court did not err by denying defendant's motion to dismiss the charges of possession of a firearm by a felon and carrying a concealed weapon. There was sufficient evidence for the State to proceed on a theory of constructive possession. **State v. Mewborn, 731.**

FRAUD

Constructive fraud—breach of fiduciary duty—mistake—summary judgment—The trial court did not err by granting summary judgment in favor of defendants on the issues of fraud, constructive fraud, and breach of fiduciary duty based on the alleged misrepresentation of the legal existence of a limited liability company. There was no evidence of an intent to deceive and plaintiffs could not show that defendants participated in a transaction through which they sought to benefit themselves. **Carcano v. JBSS, LLC, 162.**

Fraudulent transfer of real property—The trial court erred by concluding that plaintiff's complaint failed to state a claim for fraudulent transfer of property under N.C.G.S. §§ 39-23.4(a)(1) and 39-23.5(a) because the language of plaintiff's complaint tracked the relevant statutory language of N.C.G.S. § 39-23.4(a)(1) and plaintiff's complaint complied with the requirements of N.C.G.S. § 39-23.5(a). **Fischer Inv. Capital, Inc. v. Catawba Dev. Corp., 644.**

GUARANTY

Motion for directed verdict—motion for judgment notwithstanding verdict—co-lessee—The trial court did not err in an action seeking recovery for lease defaults by denying defendant's motions for directed verdict and JNOV where defendant signed an agreement as an officer of the LLCs and also as co-lessee. The meaning of co-lessee was to be determined by the jury and when an individual signs an instrument in a representative capacity and in a personal capacity, the individual is personally liable on the contract. **Telerent Leasing Corp. v. Boaziz, 761.**

Promissory notes—subject matter jurisdiction—The superior court did not err in a case involving default on promissory notes by concluding that it had subject matter jurisdiction because the promissory notes were guaranteed by defendant in order to secure funds for the development of real estate in North Carolina, the notes were each in excess of \$10,000, and plaintiff's action is a civil matter for the collection of a debt that is not otherwise delegated to the district court division. **Musarra v. Bock, 780.**

HIGHWAYS AND STREETS

Department of Transportation's duty to general public—maintenance—reasonable care—The Industrial Commission did not err in a Tort Claims case by finding that the Department of Transportation's duty to the general public includes reasonable care in maintaining highways, which is consistent with N.C.G.S. § 143B-346. **Phillips v. N.C. Dep't of Transp.**, 550.

Drop to shoulder of highway—findings—In a Tort Claims action involving an automobile accident, there was competent evidence in the record to support the Industrial Commission's findings concerning a drop of four-and-one-half to six inches between a roadway and the shoulder. **Phillips v. N.C. Dep't of Transp.**, 550.

HOMICIDE

Second-degree murder—drunken driving—malice—evidence sufficient—The State's evidence of defendant's convictions for reckless driving, alcohol consumption both before and while operating a motor vehicle, prior impaired driving, and driving while license revoked, as well as flight and elusive behavior after the collision, constituted substantial evidence of malice based upon depravity of mind sufficient to withstand a motion to dismiss a second-degree murder prosecution. **State v. Tellez**, 517.

IMMUNITY

Governmental immunity—discretionary powers—The trial court did not err in a negligence case by granting summary judgment in favor of defendant Village because: (1) a municipal corporation is not liable in an action for damages either for the non-exercise of, or for the manner in which, in good faith, it exercises discretionary powers of a public or legislative character; and (2) the Village's failure to adopt an ordinance requiring the installation of seatbelts on golf carts was beyond the purview of our courts. **Biggers v. Bald Head Island**, 83.

Mental health admissions—failure to obtain second signature—In a case involving a decedent who committed suicide after not being admitted to a mental health facility, the attachment of qualified immunity pursuant to N.C.G.S. § 122C-210.1 was not prevented by the failure to obtain a second employee's signature on the evaluation sheet. **Boryla-Lett v. Psychiatric Solutions of N.C., Inc.**, 529.

Mental health admissions—failure to page therapist—There was no failure to exercise professional judgment and thus no loss of qualified statutory immunity by not admitting a patient to a mental hospital where the patient's therapist was not paged at 2:15 a.m. **Boryla-Lett v. Psychiatric Solutions of N.C., Inc.**, 529.

Mental health admissions—necessity of gross or intentional negligence—The holding in *Snyder v. Learning Servs. Corp.*, 187 N.C. App. 480, that a plaintiff must allege gross or intentional negligence to overcome the immunity of N.C.G.S. § 122C-210.1 once it attaches, is neither dicta nor erroneous. **Boryla-Lett v. Psychiatric Solutions of N.C., Inc.**, 529.

Mental health admissions—needs assessment coordinator—professional judgment—The immunity provided by N.C.G.S. § 122C-210.1 applied in the case of a decedent who committed suicide after not being admitted to a mental hos-

IMMUNITY—Continued

pital where, despite evidence to the contrary, the determinations of the needs assessment coordinator were the result of his professional judgment and did not represent a substantial departure from accepted professional judgment. **Boryla-Lett v. Psychiatric Solutions of N.C., Inc.**, 529.

Mental health admissions—standards required—statutory immunity—In a case involving a decedent who committed suicide after not being admitted to a mental health facility, the qualified immunity available under N.C.G.S. § 122C-210.1 attaches if defendants followed accepted professional judgment, practice, and standards. Plaintiffs did not argue that defendants North Raleigh Psychiatry and Dr. Clapacs violated those standards. **Boryla-Lett v. Psychiatric Solutions of N.C., Inc.**, 529.

Mental health admissions—summary judgment—Qualified immunity is sufficient to grant summary judgment for defendant, and the qualified immunity afforded by N.C.G.S. § 122C-210.1 applies to all of the defendants in this medical malpractice action arising from decedent not being admitted to a mental health hospital and subsequently committing suicide. **Boryla-Lett v. Psychiatric Solutions of N.C., Inc.**, 529.

Mental health admissions—use of information—drug test—In a case involving a decedent who committed suicide after not being admitted to a mental health facility, defendants Jackson and Holly Hill did not lose immunity under N.C.G.S. § 122C-210.1 by violating accepted professional judgment, practice, and standards. **Boryla-Lett v. Psychiatric Solutions of N.C., Inc.**, 529.

Public duty doctrine—probation officer's placement of sexual offender—special relationship—summary judgment—Defendant's motion for summary judgment based on the public duty doctrine was correctly denied by the Industrial Commission in an action arising from a probation officer's placement of a sexual offender in a home with children whom he eventually abused. The harm was not the direct result of the probation officer's actions, and there was a question as to whether a special relationship existed between the probation officer and the children. **Blaylock v. N.C. Dep't of Corr.**, 541.

INDECENT LIBERTIES

Adult in custodial relationship with child—watching included as separate act—The trial court did not err by denying defendant's motion to dismiss three charges of indecent liberties with a minor. When an adult in a custodial relationship with a child watches that child engage in sexual activity with another person or facilitates such activity, the adult's actions constitute indecent liberties with a minor. Defendant's contention that counts for touching and watching arose from a single transaction was incorrect as there were clearly two separate acts. **State v. Coleman**, 696.

Satellite-based monitoring—conviction predated effective date of satellite-based monitoring statutes—The trial court did not err in an indecent liberties case by ordering that defendant be enrolled in a lifetime satellite-based monitoring (SBM) program even though the date upon which he committed the offense for which he was convicted predated the effective date of the SBM statutes. Retroactive application of the SBM provisions does not violate the *ex post facto* clauses of the state and federal constitutions and the record was

INDECENT LIBERTIES—Continued

devoid of any indication that the State ever agreed to forego seeking to have defendant enrolled in the SBM program. **State v. Vogt, 664.**

INDICTMENT AND INFORMATION

Answer to jury question—no inconsistency with indictment—There was no inconsistency between the indictment and the trial court's answer to a jury question about a bank loan in a prosecution for obtaining property by false pretenses. **State v. Wright, 578.**

Guilty plea—information—The Court of Appeals granted defendant's petition for *writ of certiorari* under N.C. R. App. P. 21 in a delivery of a controlled substance case and concluded that the trial court did not err by accepting defendant's guilty plea because there was no variance, much less a fatal variance, between the allegations contained in the information and the prosecutor's stated factual basis for the plea agreement. **State v. Williams, 767.**

INJUNCTIONS

Preliminary—no showing of success on merits—The trial court correctly denied a preliminary injunction in a case involving a county's transaction with a professional baseball club. Plaintiff did not show a likelihood of success on the merits. **Reese v. Mecklenburg Cnty., 491.**

INSURANCE

Filed rate doctrine—workers' compensation premiums—no employees—unfair trade practices claim—Summary judgment was properly granted for defendants on an unfair trade practices claim where plaintiff sought a refund of his workers' compensation premium. Plaintiff's claim was barred by the filed rate doctrine, which provides that a plaintiff may not claim damages on the ground that an approved rate is excessive because it is the product of unlawful conduct. **Stutts v. Travelers Indem. Co., 90.**

Workers' compensation—exposure to risks—no refund of premium—Plaintiff was not entitled to a refund of workers' compensation insurance premiums for a period during which he did not cover himself and had no employees. Defendants were nevertheless exposed to the risks in the policies because plaintiff could have hired an employee during this period. **Stutts v. Travelers Indem. Co., 90.**

JURISDICTION

Personal—Illinois corporation—doing business in North Carolina—findings—The trial court's findings of fact adequately supported its conclusion that defendant was subject to personal jurisdiction in North Carolina where defendant was an Illinois corporation that entered into a contract with plaintiff, a North Carolina corporation, to be performed in North Carolina. Defendant's contacts with North Carolina were not numerous, but the controversy arose from those contacts, and defendant purposefully availed itself of the benefits of doing business in North Carolina and reasonably could have expected that it would be brought into North Carolina courts. **Nat'l Util. Review, LLC v. Care Ctrs., Inc., 301.**

JURISDICTION—Continued

Subject matter—claim involving estate and trust—to be handled by clerk—The trial court did not err by granting a motion to dismiss for lack of subject matter jurisdiction a declaratory judgment action involving creditors' claims against an estate and assertions involving a family trust. The issues were part of the administration of the estate to be handled by the clerk. **Livesay v. Carolina First Bank, 306.**

JUVENILES

Delinquency—adjudication order—ambiguous statement of standard of proof—new trial—A new trial was ordered where the trial court applied conflicting burdens of proof and the actual standard relied upon could not be determined. The trial judge was unavailable to make the required findings on remand as she has already been sworn in as a superior court judge. **In re D.K., 785.**

Delinquency—custodial interrogation—notice of rights—persons present—The *Miranda* rights form used by a sheriff's department in questioning a juvenile correctly stated his *Miranda* rights, but did not accurately state his juvenile rights as provided by N.C.G.S. § 7B-2101. The juvenile was advised incorrectly that he could have his brother (who was 21 years old and serving in the Marine Corps) present during his custodial interrogation while the statute provides only for a parent, guardian, or custodian to be present during questioning. **In re M.L.T.H., 476.**

Delinquency—custodial interrogation—notice of rights—persons present—prejudicial error—A violation of N.C.G.S. § 7B-2101 in a delinquency proceeding concerning the family member who was present during an interrogation was prejudicial where the juvenile made statements without which the State's case would have been much weaker. **In re M.L.T.H., 476.**

LARCENY

Motion to dismiss—sufficiency of evidence—The trial court did not err by denying a juvenile's motion to dismiss a petition for larceny for insufficient evidence because the State presented substantial evidence as to each element of larceny. **In re D.K., 785.**

MORTGAGES AND DEEDS OF TRUST

Necessary parties—foreclosure sale—The trial court's order setting aside a sale and vacating a foreclosure order is itself vacated and remanded for additional proceedings upon joinder of all necessary parties. The record owner of the property who purchased it at a judicial sale without notice of infirmity of title was a necessary party. **In re Foreclosure of Barbot, 316.**

NEGLIGENCE

Cross-claim—derivative liability—The trial court did not err by granting summary judgment in favor of defendant Wachovia on the issue of defendant Cowart's cross-claim of negligence because review of the trial court's ruling on Wachovia's derivative liability is more properly presented after the underlying claims against Cowart are resolved. **Albert v. Cowart, 57.**

NEGLIGENCE—Continued

Duty of care—renting golf cart without seatbelt—hidden danger—The trial court did not err in a negligence case by granting summary judgment in favor of defendants Limited and Odell because defendants did not breach a duty of care by renting a golf cart without a seatbelt to plaintiffs or by failing to provide warning of the purported hidden danger of falling out of a golf cart. **Biggers v. Bald Head Island**, 83.

PARTIES

Failure to join necessary party—improper dismissal—The trial court's dismissal for failure to join a necessary party under N.C.G.S. § 1A-1, Rule 12(b)(7) was error because: (1) in the absence of a proper motion by a competent person, the defect should be corrected by an *ex mero motu* ruling of the court; and (2) assuming *arguendo* that the State of North Carolina was a necessary party to this action, the proper remedy was to join the State rather than dismiss the action. **Hardy v. Beaufort Cnty. Bd. of Educ.**, 403; **King v. Beaufort Cnty. Bd. of Educ.**, 368.

PLEADINGS

Motion to further amend denied—undue prejudice to opposing party—The trial court did not abuse its discretion by denying plaintiffs' motion to further amend their pleadings to include additional allegations of a commissioner's conflict of interest and *ex parte* communications prior to a rezoning hearing. Plaintiffs' delay in seeking the amendment would have unduly prejudiced defendants and the proposed amendment would have been futile. **McMilian v. Town of Tryon**, 228.

PROBATION AND PAROLE

Forfeiture—motion to set aside—denied—probation revocation—independent proceeding—Defendant's probation revocation hearing was the result of an independent charge for violating his probation and N.C.G.S. § 15A-544.5(f) did not apply (no forfeiture shall be set aside after a defendant fails to appear twice or more in the same case). **State v. Dunn**, 606.

PUBLIC ASSISTANCE

Medicaid—eligibility—purchase agreement—chattel—countable resource—The trial court erred by concluding that a purchase agreement was "chattel" and a countable resource for purposes of determining decedent's eligibility for Medicaid. The case is remanded to the superior court for further remand to the Department of Health and Human Services for further proceedings to determine whether petitioner is entitled to Medicaid assistance without the purchase agreement included in the calculation. **Estate of Wilson v. Division of Soc. Servs.**, 747.

PUBLIC OFFICERS AND EMPLOYEES

Dismissal—deference to agency's interpretation of terms—The superior court did not err in a state employee's dismissal for cause action by deferring to

PUBLIC OFFICERS AND EMPLOYEES—Continued

the Department of Transportation's interpretation of the terms "safety-sensitive" and "CDL related" job functions, and by concluding that petitioner employee's position fell within those definitions. **Keyes v. N.C. Dep't of Transp.**, 395.

Dismissal—findings of fact—sufficiency of evidence—Although petitioner in a dismissal for cause of a state employee case argued on appeal that three of the superior court's findings of fact were unsupported by the evidence and were irrelevant and immaterial to the pertinent issues, petitioner in his brief only specifically challenged a portion of one finding, and that finding was supported by competent evidence. **Keyes v. N.C. Dep't of Transp.**, 395.

Dismissal—refusal to take drug test—willfulness—The superior court erred by affirming the Personnel Commission's conclusion that petitioner employee's refusal to take a drug test was willful, and the case was remanded, where the administrative law judge never reached the issue of willfulness and petitioner did not have the opportunity to present evidence on that issue. **Keyes v. N.C. Dep't of Transp.**, 395.

PUBLIC RECORDS

Search warrants—sealed by court order—no abuse of discretion—no right of access—Plaintiffs (a newspaper and a television station) did not have a public records right of access to search warrants that had been sealed under a court order. The court did not abuse its discretion by sealing the warrants and related affidavits where the court found that the release of the information contained therein would undermine an ongoing homicide investigation and that sealing the warrants for a limited time was necessary to ensure the State's right to prosecute and defendant's right to a fair trial. **In re Search Warrants of Cooper**, 180.

RAPE

Statutory rape—statutory sexual offense—birthday rule—motion to dismiss improperly granted—The trial court erred by granting defendant's motion to dismiss the charges of statutory rape and statutory sexual offense under N.C.G.S. § 14-27.7A(b) because the trial court incorrectly applied the birthday rule resulting in the improper calculation of the victim's age. **State v. Faulk**, 118.

SCHOOLS AND EDUCATION

Discharge of tenured professor—due process—post-tenure review process—The superior court did not err by failing to find that respondent Board of Governors violated a tenured professor's due process rights in its use of the post-tenure review process to discharge him because, after petitioner's three negative post-tenure reviews, respondent followed the process set forth in Section 603 of the Code of the Board of Governors of the University of North Carolina. **Bernold v. Bd. of Governors of Univ. of N.C.**, 295.

Discharge of tenured professor—professional incompetence—disruptive behavior—whole record test—The superior court did not err by holding that substantial evidence in the record supported petitioner tenured professor's dis-

SCHOOLS AND EDUCATION—Continued

charge based on incompetence because the record contained ample evidence that petitioner was disruptive to the point that his department's function and operation were impaired. **Bernold v. Bd. of Governors of Univ. of N.C., 295.**

Discharge of tenured professor—professional incompetence—unsatisfactory post-tenure reviews—collegiality—The superior court did not err by upholding the discharge of a tenured professor for lack of collegiality. Petitioner was aware that collegiality was a professional expectation for his position, it was a possible focus of evaluation during his post-tenure reviews, and he received unsatisfactory post-tenure reviews in three consecutive years. **Bernold v. Bd. of Governors of Univ. of N.C., 295.**

SEARCH AND SEIZURE

Investigatory stop of vehicle—findings—evidence supporting—There was sufficient evidence in a narcotics prosecution to support the findings made by the trial court when upholding an investigatory stop of defendant's vehicle. **State v. Mello, 437.**

Investigatory stop—reasonable suspicion—The trial court in a narcotics prosecution correctly concluded that an officer had reasonable suspicion for an investigatory stop of defendant's vehicle. **State v. Mello, 437.**

Motion to suppress evidence of drugs—voluntary stop prior to checkpoint—The trial court did not err in a prosecution for possession with intent to manufacture, sell, and deliver a Schedule II controlled substance by denying defendant's motion to suppress evidence obtained as a result of an allegedly unconstitutional search and seizure. Defendant's argument that a checkpoint was unconstitutional was inapplicable since he stopped solely of his own volition rather than pursuant to any form of State action; the officer legitimately approached defendant's vehicle and detected the plain smell of marijuana, which provided sufficient probable cause to support a search and defendant's subsequent arrest. **State v. Corpening, 311.**

Motion to suppress—failure to stop or submit to police authority—flight—The trial court did not err in a prosecution for possession of a controlled substance, carrying a concealed firearm, and possession of a firearm by a convicted felon by failing to exclude evidence obtained after officers stopped defendant. Defendant's flight in conjunction with the attendant facts and circumstances supported a reasonable suspicion that defendant was engaged in some criminal activity when he was detained. **State v. Mewborn, 731.**

Olfactory recognition of marijuana—defendant fleeing—probable cause and exigent circumstances—The trial court did not err by admitting marijuana and drug paraphernalia found in defendant's house where officers had both probable cause and exigent circumstances to enter the house. An officer's olfactory recognition of marijuana is as reliable as an officer's visual recognition and defendant was partially out of a window in the back of the house when officers arrived. **State v. Stover, 506.**

Search after handcuffing—standard for determining arrest—The trial court erred by granting a motion to suppress the discovery of crack cocaine seized after defendant was placed in handcuffs. The trial court applied the incor-

SEARCH AND SEIZURE—Continued

rect standard to determine whether defendant was under arrest; the question is whether special circumstances existed justifying the use of handcuffs as the least intrusive means necessary to carry out the purpose of the stop rather than whether a reasonable person would have felt free to leave after he was handcuffed. **State v. Carrouthers, 415.**

Voluntariness—evidence sufficient—Even though the facts were not entirely consistent, the evidence was sufficient to support the trial court's determination that defendant voluntarily consented to a search of his house. **State v. Stover, 506.**

Warrantless search—incident to arrest exception—automobile—papers on seat—The search incident to arrest exception for warrantless searches and seizures did not apply to papers seized from the passenger seat of a vehicle where defendant was not within reaching distance of the passenger compartment of his vehicle at the time of arrest, nor was it reasonable for the officer to believe defendant's vehicle contained evidence of either offense for which he was arrested. **State v. Carter, 47.**

Warrantless search—plain view doctrine—automobile—papers on seat—The plain view doctrine did not apply to papers seen by the officer on the seat of a car during a traffic stop that lead to an arrest. The officer did not immediately ascertain from plain view examination that the papers constituted evidence of a crime or contraband, and his suspicion that defendant was trying to conceal information on the papers was not sufficient to bypass the warrant requirement of the Fourth Amendment. **State v. Carter, 47.**

SENTENCING

Active sentence completed—mootness—Defendant's argument that the active portion of his sentence exceeded statutory limits was moot where defendant had completed the sentence and did not argue collateral adverse legal consequences. **State v. Stover, 506.**

Failure to conduct separate proceeding for aggravating factors—abuse of discretion standard—The trial court did not abuse its discretion in a felonious child abuse inflicting serious bodily injury and second-degree murder case by failing to hold a separate sentencing proceeding for aggravating factors because the plain language of N.C.G.S. § 15A-1340.16(a1) vested the trial court with discretion to bifurcate the felony offense proceeding from the aggravating factor determination. **State v. Anderson, 216.**

Presumptive range—findings of aggravation and mitigation not required—The trial court did not err in a second-degree murder case by allegedly considering the fact that defendant rejected a plea offer when determining his sentence because the trial court did not make any comments pertaining to defendant's rejection of the plea offer and defendant's sentence in the presumptive range is presumed valid. **State v. Allen, 709.**

Prior record level—delivery of controlled substance—The trial court did not err in a delivery of a controlled substance case by concluding that defendant was a Level IV offender for sentencing purposes. **State v. Williams, 767.**

Prior record level—no stipulation by pro se defendant—The trial court erred by determining a *pro se* defendant's prior record level on the basis of a

SENTENCING—Continued

worksheet prepared by the State without any stipulation by defendant. **State v. Boyd, 97.**

Remand of consolidated judgment—sentence completed—A judgment in which four charges were consolidated was remanded for resentencing even if defendant had served his sentence on all charges where one of the charges was based on an unconstitutional ordinance. **State v. Mello, 561.**

Satellite-based monitoring—notice—not sufficiently specific—Defendant was entitled to a new hearing to determine whether he would be required to enroll in a satellite-based monitoring system where the notice given to him by the Department of Correction did not specify the applicable category of N.C.G.S. § 14-208.40(a) or give a brief statement of the factual basis for that determination. **State v. Stines, 193.**

SEXUAL OFFENDERS

Satellite-based monitoring—civil penalty—not punishment enhancement—The State did not need to present any fact in an indictment or to prove any facts beyond a reasonable doubt to a jury in order to subject defendant to satellite-based monitoring (SBM). The imposition of SBM is a civil remedy which does not increase the maximum penalty for defendant's crime. **State v. Hagerman, 614.**

Satellite-based monitoring—definite time—A case involving the satellite-based monitoring of a sex offender was remanded for the trial court to set a definite time for the monitoring. **State v. Morrow, 123.**

Satellite-based monitoring—determined by trial court—A Department of Correction (DOC) rating of high risk is not a necessary prerequisite to satellite-based monitoring (SBM) under N.C.G.S. § 14-208.40B(c); the trial court is not limited by DOC's risk assessment and may hear any admissible evidence relevant to the risk presented by defendant. In this case, there was evidence from a probation revocation hearing immediately preceding the SBM hearing that defendant had failed to attend sexual abuse treatment sessions. The matter was remanded for additional evidentiary proceedings and more thorough findings. **State v. Morrow, 123.**

Satellite-based monitoring—findings—An order directing defendant to enroll in satellite-based monitoring pursuant to N.C.G.S. § 14-208.40B was vacated and remanded for a new hearing where the trial court did not make the determination required by the statute. **State v. Gardner, 610.**

Satellite-based monitoring—level of supervision—risk assessment—The trial court erred by determining that defendant required the highest level of supervision and monitoring after his guilty plea to the charge of taking indecent liberties with a child because the findings of fact were insufficient to support this determination and the State only presented evidence that defendant was a moderate risk. **State v. Causby, 113.**

Satellite-based monitoring—notice of criteria—An argument concerning the absence of notice to a sex offender of the criteria for satellite-based monitoring was dismissed where defendant did not seek to refute the State's evidence or to offer any other evidence. However, the types of evidence that might be pre-

SEXUAL OFFENDERS—Continued

sent by the Department of Correction (DOC) may be gained through reference to the statutes and DOC guidelines. **State v. Morrow, 123.**

Satellite-based monitoring—notice of hearing—An argument concerning the lack of notice of satellite-based monitoring (SBM) was not addressed where defendant received timely notice of the SBM hearing and was represented by counsel at the hearing. **State v. Morrow, 123.**

SEXUAL OFFENSES

Sex offense by custodian—instruction—knowledge that victim was in his custody—not required—The trial court did not commit plain error by its instruction to the jury regarding the charge of sex offense by a custodian because defendant's knowledge that the victim was in his custody was not a required element of the charge. **State v. Coleman, 696.**

Sex offense by custodian—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of sex offense by a custodian because: (1) the State presented substantial evidence on each element of N.C.G.S. § 14-27.7(a) and that defendant was the perpetrator of the offense; and (2) the State is not required to present evidence that a defendant knew or should have known the victim was in his custody or in the custody of his principal or employer. **State v. Coleman, 696.**

Statutory rape—statutory sexual offense—Birthday Rule—motion to dismiss improperly granted—The trial court erred by granting defendant's motion to dismiss the charges of statutory rape and statutory sexual offense under N.C.G.S. § 14-27.7A(b) because the trial court incorrectly applied the Birthday Rule resulting in the improper calculation of the victim's age. **State v. Faulk, 118.**

STATUTES OF LIMITATION AND REPOSE

Accrual of § 1883 claim—federal question—The question of when a 42 U.S.C. § 1983 claim accrues is a question of federal law. **Housecalls Home Health Care, Inc. v. State, 66.**

Contract and tort claims—Medicaid payments withheld—The trial court correctly granted summary judgment for the State based on the statute of limitations on contract and tort claims arising from the withholding of payments from the State to plaintiff for medical care given to Medicaid patients. **Housecalls Home Health Care, Inc. v. State, 66.**

Wrongful death—qualification of administratrix of estate—ratification and relation back—The dismissal of a wrongful death action as barred by the statute of limitations was reversed where plaintiff was not appointed as administratrix of the estate until after the statute of limitations had run. Ms. Tallman's participation in the lawsuit once she had become administratrix was sufficient to ratify the filing of the summons and application for extension of time. **Estate of Tallman v. City of Gastonia, 13.**

TAXATION

Ad valorem—corporate airplane—modification in Delaware—SAS was required to pay *ad valorem* taxes on an airplane consistent with the plane's value

TAXATION—Continued

on 1 January 2003 where the plane was in Delaware on that date for installation of a custom interior and stayed there through early September of 2003. SAS presented no evidence that the plane was intended to remain in Delaware after the interior was completed and the plane is properly classified as having been located in Delaware only for temporary maintenance or alteration. **In re Appeal of SAS Inst. Inc., 238.**

Sales and use tax—exemption—packaging materials—The trial court did not err in a sales and use tax case by granting summary judgment in favor of plaintiff because the packaging materials plaintiff used to ship goods to its customers qualified for the tax exemption under N.C.G.S. § 105-164.13(23)(b). **Parkdale Am., LLC v. Hinton, 275.**

TERMINATION OF PARENTAL RIGHTS

Best interests of child—abuse of discretion standard—The trial court did not abuse its discretion by concluding that it would be in the best interests of the juveniles to terminate respondent father's parental rights because the trial court considered the factors required by N.C.G.S. § 7B-1110(a) and respondent did not provide any basis for reversal of the trial court's order. **In re M.D., N.D., 35.**

Best interests of child—failure to exhibit parental interest in child—The trial court did not abuse its discretion by concluding that it was in the best interests of the minor child to terminate respondent biological father's parental rights because N.C.G.S. § 7B-1110 does not require that termination lead to adoption in order for termination to be in a child's best interests, and respondent has not taken any actions exhibiting a parental interest in the minor child other than consenting to the DNA test which ultimately established his paternity. **In re M.M., 248.**

Findings—alternative child care arrangements—The trial court erred in a termination of parental rights case by finding and concluding that DSS proved that respondent lacked an alternative child care arrangement, and the case was reversed and remanded for further findings of fact on this issue. **In re N.B., I.B., & A.F., 773.**

Findings—parent's mental or other incapability—substance abuse—Respondent's argument in a termination of parental rights case that there was insufficient evidence to support the trial court's conclusion that she had a mental or other incapability was overruled. Incapability may be the result of substance abuse or mental illness under N.C.G.S. § 7B-1111(a)(6) and the evidence indicated that respondent had a history of substance abuse and mental illness which interfered with her ability to parent her children. **In re N.B., I.B., & A.F., 773.**

Grounds—abandonment—The trial court did not err in concluding that grounds existed to terminate respondent father's parental rights because the unchallenged findings of fact supported the trial court's conclusion that respondent abandoned the children within the meaning of N.C.G.S. § 7B-1111(a)(7). **In re M.D., N.D., 35.**

Grounds—sufficiency of evidence—The trial court erred by concluding that grounds existed under N.C.G.S. § 7B-1111(a)(2) and (7) to terminate respondents'

TERMINATION OF PARENTAL RIGHTS—Continued

parental rights where the trial court made no specific findings regarding whether there was continued domestic violence and alcohol abuse and the facts did not establish that respondents were withholding their presence, love, or care, or that they have chosen to forego all parental duties and relinquish all parental claims. **In re F.G.J., M.G.J., 681.**

Guardian ad litem representation—prior violations cannot be used—The trial court did not violate respondent's rights in a termination of parental rights proceeding by allegedly failing to ensure that the children had proper *guardian ad litem* representation throughout every critical stage of the proceeding. Any alleged violation of N.C.G.S. § 7B-601(a) with respect to prior termination hearings may not be used to challenge the order presently on appeal. **In re N.B., I.B., & A.F., 773.**

No requirement to conduct bifurcated hearing—proper evidentiary standards—The trial court did not abuse its discretion in a termination of parental rights case by conducting an improperly bifurcated hearing because the court applied the different evidentiary standards at each of the two stages and there is no requirement that the stages be conducted at two separate hearings. **In re F.G.J., M.G.J., 681.**

Remand—new ground for termination—not allowed—The trial court erred by terminating respondent's parental rights after remand on a new ground where that new ground had originally been alleged but not adjudicated and plaintiff had not cross-assigned error to the failure to adjudicate on the alternate grounds. The trial court had the authority to continue to exercise supervision of the case and DSS can file a new petition based on new grounds. **In re S.R.G., 594.**

Standard of proof—clear, cogent, and convincing evidence—The trial court did not commit prejudicial error in a termination of parental rights case by identifying the standard of proof used in making its findings of fact as "clear and cogent" where the record revealed that the trial court applied the proper evidentiary standard. Respondent did not challenge the sufficiency of the evidence to support any of the factual findings that underlie the trial court's determination that respondent's parental rights to both minor children were subject to termination under N.C.G.S. § 7B-1111(a)(7). **In re M.D., N.D., 35.**

Unknown father—compliance with N.C.G.S. §§ 7B-1104 and 7B-1105—The trial court did not err by concluding that grounds existed under N.C.G.S. § 7B-1111(a)(5) to terminate respondent's parental rights to the minor child where respondent's identity as the father of the child was initially unknown. The Department of Social Services (DSS) complied with N.C.G.S. § 7B-1104 when filing the petition to terminate the parental rights of an unknown father and DSS and the trial court complied with N.C.G.S. § 7B-1105 and properly added respondent as a party to the termination proceeding. **In re M.M., 248.**

TORT CLAIMS ACT

Drop to shoulder of highway—no notice to Department of Transportation—no negligence—Given the unchallenged evidence, it could not be said that the Industrial Commission erred by determining that the Department of Transportation (DOT) lacked actual or constructive notice of a drop of several inches between the highway and the shoulder in a Tort Claims case arising from

TORT CLAIMS ACT—Continued

an automobile accident. Those findings supported the conclusion that DOT did not negligently breach its duty. **Phillips v. N.C. Dep't of Transp.**, 550.

TRIALS

Orders—handwritten—Trial courts should prepare typewritten, as opposed to handwritten, orders, or alternatively, direct counsel to prepare typewritten orders on the trial court's behalf. **State v. Corpening**, 311.

TRUSTS

Constructive trust—summary judgment—The trial court did not err by granting summary judgment in favor of defendants on a constructive trust issue because defendants did not, as a matter of law, come into possession or control of the legal title to the pertinent properties. **Carcano v. JBSS, LLC**, 162.

UNFAIR TRADE PRACTICES

Failure to show affect on commerce—summary judgment—The trial court did not err by granting summary judgment for defendants on the issue of unfair and deceptive trade practices because the alleged events and statements did not affect commerce outside the parties' limited business relationship. **Carcano v. JBSS, LLC**, 162.

UNJUST ENRICHMENT

Summary judgment—no better legal position—The trial court did not err by granting summary judgment in favor of defendants on the issue of unjust enrichment because defendants were in no better legal position than plaintiffs and were not unjustly enriched. **Carcano v. JBSS, LLC**, 162.

WORKERS' COMPENSATION

Additional compensation denied—maximum medical improvement—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff was not entitled to additional medical treatment under N.C.G.S. § 97-25 where the evidence indicated that plaintiff had reached maximum medical improvement. There is nothing in the Commission's conclusion that would foreclose plaintiff from requesting additional treatment pursuant to N.C.G.S. § 97-25.1 before the statute of limitations runs. **Fonville v. General Motors Corp.**, 267.

Disability payments—unilateral termination—The Industrial Commission erred in a workers' compensation case by determining that plaintiff was not entitled to disability compensation through the date she returned to work where defendant had been making payments pursuant to a Form 60 but unilaterally stopped payments without informing the Commission. Payment of compensation pursuant to a Form 60 constitutes payment pursuant to an award of the Commission, and once compensation under an award of the Commission begins, payments can only be stopped under certain circumstances and after following specific procedures. **Fonville v. General Motors Corp.**, 267.

WORKERS' COMPENSATION—Continued

Late penalty—unilateral termination of benefits—The portion of an Industrial Commission award denying a workers' compensation plaintiff a late payment penalty was remanded for a determination of the amount of late fees due where defendant unilaterally suspended payments that were due to plaintiff while a valid award of the Commission was still in effect. **Fonville v. General Motors Corp.**, 267.

Lien—amount—subject matter jurisdiction—Rule 60(b) relief—The trial court had subject matter jurisdiction to enter an amended order in an action to determine the amount of defendants' statutory workers' compensation lien. Rule 60(b) relief is within the sound discretion of the trial court, the court's intentions about the distribution of attorney fees is not clear from the record, and subsequent correspondence by the parties suggested that neither the parties nor the Industrial Commission could agree on how to interpret the court's order. **Alston v. Fed. Express Corp.**, 420.

Lien—attorney fees—The trial court erred in an action to determine the amount of a workers' compensation lien by awarding attorney fees under N.C.G.S. § 97-10.2(j). Attorney fees are not allowed as a part of the costs in civil actions or special proceedings without express statutory authority and N.C.G.S. § 97-10.2(j) does not authorize an award of attorney fees as part of the costs of third-party litigation. **Alston v. Fed. Express Corp.**, 420.

Lien—findings—The trial court erred by failing to consider and make findings as to factors that must be considered pursuant to N.C.G.S. § 97-10.2(j). Although the statute gives the court the discretion to adjust the amount of a workers' compensation lien, the court must make findings and conclusions sufficient for meaningful appellate review. **Alston v. Fed. Express Corp.**, 420.

Maximum medical improvement—evidence sufficient—The Industrial Commission did not err in a workers' compensation case in its determination of when maximum medical improvement was reached where the finding was fully supported by competent evidence. **Fonville v. General Motors Corp.**, 267.

Third-party settlement—lien not waived—remand—Defendants in a workers' compensation case did not waive their right to pursue a lien against third-party settlement proceeds where such a lien was the subject of a stipulation and a settlement agreement. The Industrial Commission failed to determine whether third-party settlement proceeds had been distributed, or to whom, and whether defendants were entitled to a lien. The matter was remanded. **Jones v. Steve Jones Auto Grp.**, 458.

Workplace mold—causal connection to illness—There was competent evidence in a workers' compensation case to support the Industrial Commission's findings that plaintiff's workplace exposure to mold caused his illness. There was no support for defendant's statement that the air sampling relied on by plaintiff's treating physicians did not reflect the air plaintiff breathed. **Jones v. Steve Jones Auto Grp.**, 458.

Workplace mold—findings—ubiquitous mold—Testimony in a workers' compensation proceeding was competent to support challenged findings regarding plaintiff's occupational mold exposure despite defendant's contention that there was no competent evidence to distinguish plaintiff's occupational exposure from ubiquitous mold. **Jones v. Steve Jones Auto Grp.**, 458.

WORKERS' COMPENSATION—Continued

Workplace mold—no evidence of peculiar sensitivity—Although defendants argued in a mold-related workers' compensation case that plaintiff's illness was the result of a preexisting personal sensitivity and was not compensable, there was no evidence that plaintiff had a heightened peculiar sensitivity to mold before his exposure in the workplace. **Jones v. Steve Jones Auto Grp.**, 458.

Workplace mold—requirement to work in contaminated location—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff contracted an occupational disease from mold in his office. Although the nature of plaintiff's work as an auto dealership manager did not increase his risk for contracting pulmonary airway disease, the fact that his employment required him to work in a building contaminated with mold did place him at an increased risk. **Jones v. Steve Jones Auto Grp.**, 458.

WRONGFUL DEATH

Workplace safety—no showing company voluntarily undertook independent obligation to monitor safety—The trial court did not err in a wrongful death case by granting summary judgment in favor of defendant GE because there were no allegations of any specific undertaking by GE that would create a genuine issue of material fact that GE went beyond concern or minimal contact about safety matters and assumed the primary responsibility for workplace safety at a GE subsidiary. **Edwards v. GE Lighting Sys., Inc.**, 754.

ZONING

Rezoning—range of permitted uses—Plaintiffs failed to establish that the Board of Aldermen did not conduct the proper assessment of the range of permitted uses in the pertinent rezoned areas, and thus the rezoning was not void on this basis. **Musi v. Town of Shallotte**, 379.

Rezoning—spot zoning—A rezoning was not spot zoning where the property did not have a single owner and was not surrounded by a uniformly zoned area. The question of whether it was illegal spot zoning was not reached. **Musi v. Town of Shallotte**, 379.

Rezoning—summary judgment—scope of review—The trial court erred in a rezoning case by granting defendants' motion for summary judgment; the matter is remanded to the trial court for imposition of the standard of review set forth in *Friends of Mt. Vernon Springs, Inc.*, 190 N.C. App. 633 (2008). **McMillan v. Town of Tryon**, 228.

Standing—special damages—The superior court erroneously dismissed for lack of standing petitioners' appeal from the Town Council's approval to rezone property to allow further development. There was testimony sufficient to establish petitioners' standing with special damages resulting from water runoff, septic tank pollution, increased noise, increased traffic on narrow roadways, and danger to petitioners and neighborhood children on the roadways. **McMillan v. Town of Tryon**, 282.

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